

AN

ABRIDGMENT

OF THE

LAW OF NISI PRIUS.

VOL. I.

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| <p>1. ACCOUNT.</p> <p>2. ADULTERY.</p> <p>3. ASSAULT AND BATTERY.</p> <p>4. ASSUMPSIT.</p> <p>5. ATTORNEY.</p> <p>6. AUCTION.</p> <p>7. BANKRUPT.</p> <p>8. BARON AND FEME.</p> <p>9. BILLS OF EXCHANGE AND
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*Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si
totius operis fides uniuscujusque periodi fide nitatur.* — PREF 6 RFP.

FOURTH EDITION
WITH ADDITIONS.

LONDON:

PRINTED FOR W. CLARKE AND SONS, LAW BOOKSELLERS,
PORTUGAL STREET, LINCOLN'S INN

1817.

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TO THIS FOURTH EDITION.

In the present edition an alteration has been made in the arrangement of the second volume. The cases relating to Seamen's Wages, and the Ship Registry Acts, instead of being distributed, as in the former editions, under the titles of Master and Servant, and Trover, have been placed under a separate title of Shipping. The modern statutes and decisions have been introduced under the proper heads, except in a few instances, which, coming too late for insertion there, will be found among the Addenda.

*Lincoln's Inn,
January, 1817.*

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TO THE THIRD EDITION.

ANOTHER impression of this work having been called for, the Compiler has embraced the opportunity to insert two new Chapters, under the titles of *Mandamus* and *Quo Warranto*, in which he has endeavoured to treat those important subjects in as full and comprehensive a manner as the nature of an abridgement will permit. The cases which have been decided since the publication of the second edition, are inserted under the proper heads. An Appendix, containing some practical forms, which may be useful at the sittings and assizes, has been subjoined; and the Index to the principal matters has been enlarged. In other respects, this edition corresponds with the former.

Lincoln's Inn,
July, 1812.

PREFACE

TO THE SECOND EDITION.

THE object of the following work is to investigate and explain that branch of jurisprudence, which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs, or, as they are frequently termed, civil injuries. Considering the utility and importance of the subject, it cannot fail to excite the surprise of the reader, when he is informed that a well-digested treatise on the law of actions remained for so great a length of time a desideratum in the profession, that it was not until the year 1767, that an anonymous compilation, (the first deserving any notice) entitled “*An Introduction to the Law relative to Trials at Nisi Prius,*” was published. The same work was republished by the late Mr. J. Buller, in the year 1772. Although the title page is silent as to this being a second edition, yet, from an examination of the contents, it appears very clearly that Mr. J. Buller’s book is merely a republication of the anonymous treatise published in 1767. It is very remarkable, that at this day so many different opinions should exist as to the real author of this compilation; some persons ascribing it to Mr. Ford, others to the late Mr. J. Clive, and others to Mr. Bathurst. Unquestionably it was the received opinion at the bar, upon the first appearance of this work, that it had been compiled by Mr. Bathurst, afterwards Lord Apsley, for his own private use. But the dedication by Mr. Buller to Lord Apsley, prefixed to the edition in 1772, which must have escaped the notice of those persons who have so confidently ascribed this work to a different author, places the question beyond the reach of controversy. That dedi-

cation expressly recognises this treatise as owing its origin to a collection of notes formerly made by Lord Apsley for his own private use.

Mr. Bathurst's book having passed through several editions, was succeeded by a similar work, entitled "A Digest of the Law of Actions and Trials at Nisi Prius," by Mr. Espinasse, of which there have been three editions.*

The compiler of the following pages conceived that a treatise, intended as a companion at the sittings in London and Middlesex, and on the circuit, might be cast into a more convenient form than that adopted by either of the former writers; and that the cases might be abridged with greater accuracy and precision. Under this impression, the Abridgment of the Law of Nisi Prius was prepared and published in three parts successively, in the years 1806, 1807, and 1808. The second edition is now submitted to the candour of the profession.

The cases which have been decided since the publication of the former impression, and which are inserted under the proper heads; two new chapters on the law relating to partnership, and stoppage in transitu, subjects of considerable importance in the present state of trade and commerce; together with a general index, constitute the principal difference between this and the former edition. A few cases decided by Lord C. J. Raymond (inserted for the first time in the present edition, principally under title Common), have been transcribed from the MSS. of the late Mr. Serjeant Leeds which form a part of Mr. Serjeant Hill's collection, lately purchased by the Society of Lincoln's Inn.

Lincoln's Inn,

Nov. 1809.

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282 n. b. *for* Cooper Hunchin *read* Cooper v. Hunchin.
352 note n. instead of " the words scored, under" *read* " the words in italics."
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— v. Wood	482, 935, 978		
Worthington v. Barlow	743		
Wortley v. Herpingham	1211		
Wotton v. Hele	456		

CHAP. I.

OF THE ACTION OF ACCOUNT.

- I. *In what Cases the Action of Account may be maintained.*
- II. *Of the Pleadings and Evidence.*
- III. *Of the Judgment,*
 1. *To account.*
 2. *Final.*
- IV. *Execution.*

I. *In what Cases the Action of Account may be maintained.*

A PREFERENCE, of late years, having been given to the mode of proceeding by bill in a court of equity, (where a discovery by the defendant's answer upon oath may be obtained,) and having the account taken before a master in the Court of Chancery, or before the deputy-remembrancer in the Court of Exchequer, the action of account has in a great measure fallen into disuse. It will not, therefore, be necessary to enter fully into the nature of this action, but briefly to apprise the reader in what cases it may be maintained, what pleas may be pleaded to it, and in what form judgment may be entered.

To maintain an action of account, there must be either a privity in deed, by the consent of the party, (for an action of account does not lie against a disseisor or other wrong-doer,) or a privity in-law, as in the case of a guardian, &c.

By the common law, an action of account may be maintained by the heir, after he has attained the age of 14 years.

^a 1 Inst. 172. a

^b Lit. s. 123. 1 Inst. 89. a.

against the guardian in socage(1); so at the common law account will lie against a bailiff(2) or receiver^e, and in favour of trade and commerce by one merchant against another. But this action did not lie for one joint-tenant, or tenant in common, against his companion, although he should have taken the whole profits to his own use, unless he had been appointed bailiff to render an account^d. But now, by stat. 4 Ann. c. 16. s. 27. an action of account may be maintained by one joint-tenant, or tenant in common, his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion, and against the executors or administrators of such joint-tenant, or tenant in common.

One tenant in common brought an action of account against another^e, and charged him as bailiff and receiver. As to the account against him as bailiff, the defendant entered into the account; and as to the account against him as receiver, demurred specially, because the plaintiff did not state by whose hands the defendant received the money: the court held the exception good, notwithstanding 4 Ann. c. 16. s. 27. for that statute only empowered the plaintiff to charge the defendant as bailiff; but as the plaintiff had gone further, and charged the defendant as receiver, he ought to have shewn by whose hands he received the money, as was required by the common law^f. As the statute is a general statute, it is not necessary for the plaintiff to set it forth, or to refer to it; but he must set forth so much as to bring his case within the statute^g; and therefore, in an action of account, by one tenant in common against another, upon this statute, the plaintiff must state in his declaration, that he and defendant were tenants in common, and that defendant

^e 1 Inst. 172. a.

^d 1 Inst. 200. b.

^e Walker v. Holiday, Comyn's Rep. 272.

^f 1 Inst. 172. a.

^g Wheeler v. Horne, Willes, 208.

(1) The guardian in socage, like all other accountants, by the common law may claim an allowance of all his reasonable costs and expenses.

(2) By bailiff is understood a servant, who has administration and charge of lands, goods, and chattels, to make the best benefit to the owner. Against such bailiff an action of account lies for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expenses being deducted. An infant shall not be charged on such account. 1 Inst. 172. a.

has received more than his just share. It is not sufficient to charge defendant merely as bailiff (3).

Where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account and not of assumpsit^h; but for the balance of an account assumpsit lies, though the items on each side are numerous. 5 Taunt. 431.

At the common lawⁱ, executors in general could not have this action for an account to be made to the testator, because the account rested in privity; but the stat. Westm. 2. 13 Edw. 1. stat. 1. c. 23. gave this action to executors, and (according to Sir Edward Coke, 1 Inst. 89. b. 2 Inst. 404.) the statute of 31 Edw. 3. stat. 1. c. 11. (4) to administrators. The stat. 25 Edw. 3. stat. 5. c. 5. has extended the same remedy to the executors of executors.

At the common law, this action did not lie *against* the executors of the accountant (5); but by stat. 4 Ann. c. 16.

^h Scott v. McIntosh, 2 Camp. N. P. C. ⁱ Lit. s. 125. ¹ Inst. 89. b. 90. b. 238. ² Inst. 403.

(3) An action of account against a tenant in common on this statute, differs from an action of account against a bailiff at common law; for a bailiff at common law was answerable, not only for his actual receipts, but for what he might have made of the lands without his wilful default; but, by the words of this statute, a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion. Per Willes, C. J. delivering the opinion of the court in *Wheeler v. Horne*, Willes, 209, 210.

(4) This statute empowers the ordinary, in the case of intestacy, to depute the next and most lawful friends of the intestate to administer his goods; which deputies shall have an action to demand and recover, as executors, the debts due to the intestate. See a precedent of a declaration in account by an administrator.—Vindian's Entries, p. 75.

(5) These rules of the common-law, viz. 1. That account did not lie *by* executors^{*}; 2. That account could not be maintained *against* executors, had some exceptions. As to the first, an account might have been maintained at the common law by the executors of *merchants*; as to both, in the case of the king, the action lay[†]. It should also be remarked, that, though at the common law, executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of debt for the balance[‡].

^{*} Hargrave's Co. Lit. 90. b. n. (3).

[†] F. N. B. 117. 11 Rep. 90. a.

[‡] F. N. B. 267. Lord Hale's note.

s. 27. an action of account may be maintained against the executors or administrators of a guardian, bailiff, or receiver.

This action does not lie against an infant^k(6); nor by one executor against another^l, for the possession of the one is the possession of the other.

II. Of the Pleadings and Evidence.

THE defendant may plead in bar to this action^m, that he was never bailiff or receiver, or that he has fully accounted, or any matter, which tends to shew that he was never accountable: or a release.

When the plaintiff charges the defendant as receiver from such a time to such a timeⁿ, the defendant must answer the whole time (7) precisely (8).

By stat. 21 Jac. 1. c. 16. s. 3. actions of account (other than such accounts as concern the trade of merchandise between merchant and merchant, then factors, or servants,) must be commenced and sued within six years next after the cause of action.

If the defendant plead, that he was never receiver^o, he

^k 1 Inst 89 b 1 Inst 172 a ⁿ Southcot v Rider, T Raym 5,
^l 1 F. N. B. 271. 1to edit note(f) ^o 2 Roll Abrid 693 (1) pl 1
^m 1 R. A. 121. 1st Intr 16. R 1st
 Entr 17. 19 21

(6) Hence an infant cannot be guardian in socage. 1 Inst. 88. b.

(7) It is a general rule in pleading, that the plea must answer every material part of the declaration. If a plea begin with an answer to the whole, but in truth the matter pleaded be only an answer to part, the plea is bad, and the plaintiff may demur; but if the plea begin as an answer to part, and is in truth an answer to part only, it is a discontinuance, of which the plaintiff may take advantage; the plaintiff, however, ought not to demur in this case, but to take his judgment for the part unanswered by *nil dicit*; for if the plaintiff demurs, or pleads over, the whole action is discontinued. 1 Roll's Abrid. 487. pl. 10.—Weaks v. Peach, 1 Salk. 179. Market v. Johnson, 1 Salk. 180.—Vincent v. Boston, 1 Lord Raym. 716.—Piers v. Henriques, 2 Lord Raym. 841.—Gilb. Hist. C. B. 155. 158.

(8) Money cannot be paid into court in this action; per Willes, C. J. Bull. N. P. 128.

cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet, as upon the delivery, he was accountable conditionally, (viz. if he did not deliver over,) the evidence does not support the plea.

So a release cannot be given in evidence under the plea, that the defendant was never receiver^p.

In account against the defendant^q as receiver by the hands of A, it is sufficient for the plaintiff to prove that A directed the defendant to borrow of another to pay the plaintiff; that the defendant borrowed accordingly, and that A gave bond to the lender.

III. Of the Judgment,

1. To account.

2. Final.

1. THERE are two judgments in this action:—the first judgment is, that the defendant do account^r, usually termed a judgment *quod computet* (9). This is in the nature of an award of the court, interlocutory only and not definitive^s, and whereon a writ of error does not lie. It is, however, essentially necessary that this judgment should be entered^t; for where the defendant pleaded that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly, and execution taken out; the court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to

p Willoughby v. Small, 1 Brownl 24. s Metcalf's case, 11 Rep. 38 u.
 q Harrington v. Deane, Hob. 36. t Hughes v Burgess, Ca Temp. Hard.
 r Co. Ent. 46 b. Rust. Ent. 17. 394.

(9) The form of this judgment, in the case of Godfrey v. Saunders, 3 Wils. 88. was as follows:—"therefore it is considered, that the defendant account with the plaintiff of the time aforesaid, in which he (defendant) and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandises, &c. to be merchandised and made profit of for plaintiff; and the defendant in mercy, &c. because he hath not before accounted, &c."

have been only a judgment to account; and they compared the irregularity in this case to the irregularity of signing final judgment before interlocutory judgment.

After the judgment to account, the defendant usually offers to account, and thereupon the court assigns auditors to take and declare the account between the parties. The auditors assigned^a, are, in general, some of the officers (10) of the court, who may convene the parties before them from day to day, until the account is determined. If the auditors find the parties remiss and negligent, they must certify to the court that they will not account. By stat. 4 Ann. c. 16. s. 27. the auditors are empowered to administer an oath, and examine the parties touching the matters in question, and for the trouble in auditing and taking such account, shall have such allowance as the court shall judge reasonable, to be paid by the party on whose side the balance of account shall be.

Special bail is not to be found until after the judgment to account^{*} (11). If the defendant^v, after the judgment to account, does not personally appear in court to give bail to account, there must issue a *capias ad computandum* for the purpose of bringing him into court.

With respect to pleading before the auditors, the following rules are to be observed: 1. In order to avoid trouble and charge to the parties^z, what might have been pleaded in bar to the action shall not be allowed as a discharge before the auditors. 2. If the party is once chargeable and accountable^x, he cannot plead any matter in bar, except a release, or *plene computavit*; but must plead before the auditors. The exceptions proceed on this ground, that a release, and the having fully accounted, are total extinctions of the right of action^b, of which the court is to judge; and even in these cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. 3. No-

^a Williams v. Lee, 1 Mod. 42. See ^z Taylor v. Page, Cro. Car. 116. 3 Wils. the form, 3 Wils. 80. 113. S. P.

^x Reeves v. Gibson, 1 Lev. 300. ^a 3 Wils. 113. 114.

^y Chester v. Hunt, C. B. M. 13 G. 2. ^b 1 Brownl. 24. 25.

(10) In Godfrey v. Saunders, C. B. E. 10 G. 3. 3 Wils. 73. the three prothonotaries were assigned auditors.

(11) It was said, by all the prothonotaries in the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet, in special cases, by the discretion of the court, he shall find bail. Noy, 28.

thing can be pleaded before the auditors^c contrary to what has been previously pleaded and found by verdict, because the consequence would be, either two contradictory verdicts, which would perplex the court, or two similar verdicts, which would be nugatory. 4. If the defendant plead, before the auditors^d, any matter in discharge, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who, thereupon, will award a *venue facias* to try it; and if on the trial the plaintiff make default, he shall be nonsuited; but, notwithstanding the nonsuit, he may bring a *scire facias* upon the first judgment.

2. The final judgment is^e, that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear (12). A writ of error lies upon this last judgment only; but, although it be found erroneous, and reversed, the first judgment shall stand in force; for the two judgments are distinct and perfect (13).

IV. Execution.

It is not unworthy of remark, that this action is the first of a civil nature in which process of execution against the person was given. This process is given by stat. Westm. 2. 13 Edw. 1. c. 11.; but, under this act, the guardian in socage cannot be committed to prison, for he is in *loco parentis*, and the words of the statute are *de servientibus, ballivis, &c.*

c 3 Wils. 114
d Bull. N. P. 128.

e Metcalf's case, 11 Rep. 40 a.

(12) The form of this judgment for the plaintiff upon demurrer to plea before the auditors, in *Godfrey v. Saunders*, 3 Wils. 94. was as follows: "Therefore it is considered, that the plaintiff do recover against the defendant the aforesaid £12,000, (the sum laid in the declaration) for the value of the goods and merchandises aforesaid, and also 278l. 7s. 9d. for his damages, as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff, in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy, &c."

(13) The reader, who is desirous of further information concerning the nature of this action, is referred to the record and proceedings in the case of *Godfrey v. Saunders*, 3 Wils. 73.

CHAP. II.

OF ADULTERY.

- I. *Of the remedy for this Injury, and in what Cases an Action may be maintained.*
- II. *Of the Venue—Declaration—Plea.*
- III. *Of the Evidence, and herein of the Marriage Act,*
26 G. 2. c. 33.
- IV. *Of the Damages.*

I. Of the Remedy for this Injury, and in what Cases an Action may be maintained.

IN ancient times adultery was inquirable in tourns and leets^a, and punished by fine and imprisonment; but at the present day this offence belongs to the ecclesiastical courts, and the temporal courts do not take any cognizance of it as a public wrong. Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction, but they have, for the most part, been wholly ineffectual (1). During the time of the commonwealth, in the year 1650, when, as Blackstone justly remarks^b, the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and

a 3 Inst 206

b 4 Bl. Com p. 64.

(1) In the year 1604, (3 James I.) a bill was brought into parliament "for the better repressing the detestable crime of adultery." This bill was committed, but when the report was made by the committee, the Earl of Hertford said, that they found the bill rather concerned some particular persons than the public good, whereupon the bill was dropped. See 5th vol. of Parl. Hist. p. 88.

purity of morals, adultery was made a capital crime (2). But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour; adultery, therefore, at the present day, as far as respects the temporal courts, is considered merely as a civil injury; and the only remedy, which the law affords, is an action, whereby the husband may recover, against the adulterer, a compensation (3) in damages for the loss of the society, comfort, and assistance of his wife, in consequence of the adultery.

Although there are not wanting authorities^c to shew that the action for adultery is, for some purposes at least, to be considered as an action on the case, yet, from a late decision in the Court of Common Pleas, it must now be considered as the subject of an action of trespass. The case alluded to is, that of *Woodward v. Walton*, C. B. Trin. 47 Geo. 3. 2 Bos. and Pul. N. R. 476. The court there held, that an action for debauching the plaintiff's daughter *per quod servitium amisit* is an action of trespass, and that consequently a count for that purpose might be joined with a count for breaking and entering the plaintiff's house. Sir J. Mansfield, delivering the opinion of the court, introduced the following remarks:—"A little confusion has arisen in some of the cases from the insertion of the words *vi et armis* in declarations in actions on the case, those words being generally applicable to actions of

^c *Cooke v. Sayer*, 6 East, 388, 9.
Batchelor v. Bigg, 3 Wils. 319. 2
 Bl. R. 354. per *Grose J.* in *Weedon v.*

Timbrell, 5 T. R. 361. and 6 East,
 391.

(2) The provisions of the statute made for this purpose were these—"that if any married woman should be convicted of being carnally known by any man other than her husband, (except in case of ravishment,) such offence should be adjudged felony, and every person, as well the man as the woman, offending therein, should suffer death without benefit of clergy, provided that this should not extend, 1st, to any man, who did not know at the time of such offence committed, that the woman was then married; or, 2ndly, to any woman whose husband should be beyond the seas for three years, or reputed dead; or, 3dly, to any woman whose husband should absent himself for three years in any place, so as the wife should not know her husband to be living within that time." See *Scobell's Acts*, Part 2, p. 121. Fo. Ed.

(3) Strictly speaking an injury of this kind will not admit of any, much less a pecuniary compensation.

trespass only; and I certainly do not recollect to have seen them used in actions upon the case. In actions like the present, as far as my recollection goes, the form of the declaration has always been in trespass *vi et armis et contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation, the violence is not the ground of the action: both in that case and in this, if the injury were committed with violence, it would amount to a rape. I do not see, therefore, any good reason why either of them should be the subject of an action of trespass. *But it seems from the cases which we have looked into, that the action for criminal conversation has been considered for years as the subject of an action of trespass.* In actions by a master for an assault upon his servant, *per quod servitium amisit*, there is no trespass against the plaintiff; the sole foundation of the action is the loss of service; yet this also has been considered as an action of trespass.^a

Having endeavoured to explain the nature of the action, the next object of inquiry is, under what circumstances the law permits this action to be maintained; and first, it is essentially necessary, that the husband should present himself in court, with clean hands, as has been said, that is, without any imputation of having courted his own dishonour, or having been instrumental to his own disgrace; for it is now settled^b, that if the husband has consented to, or provided means for the adulterous intercourse of his wife with the defendant, the ground of the action is removed, and the defendant will be entitled to a verdict; for *volenti non fit injuria* (4). So if the husband, after marriage, transgresses those rules of

^d See *Ditcham v. Bond*, B. R. E. 54 G. 3. s. Maule and Selwyn, 436 S. P. recognizing *Woodward v. Walton*.
^e *Per de Grey, C. J.* in *Howard v. Bur-*
touwood, C. B. Middx. Sitt. after T.

T. 16 Geo. 2. Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651. and there said by Buller J. to be settled law.

(4) From Lord Kenyon's account of *Cibber v. Sloper*, in 4 T. R. 655, it would appear as if the verdict in that case had been given in conformity with this position. But, in fact, the jury in *Cibber v. Sloper* found a verdict for the plaintiff with £10 damages. The cause was tried before Lee, C. J. at the Middlesex sittings after Michaelmas term, 1738: Strange, solicitor-general for the plaintiff; Mr. Murray (afterwards Lord Mansfield) and other counsel, for the defendant. The case is truly stated in Buller's N. P. p. 27, as

conduct which decency requires^f, and affection demands from him, and in an open, notorious, and undisguised manner, carries on a criminal correspondence with other women, he cannot maintain this action (6).

^f Wyndham v. Lord Wycombe, 4 Esp. N. P. C. 16. and Sturt v. Marq. of

Blandford, there cited, both ruled by Kenyon, C. J. (5).

follows: "In *Cibber v. Sloper*, it was holden, that the action lay, though the privity and consent of the husband to the defendant's connexion with the wife were clearly proved." The clear proof here alluded to was this—that the plaintiff and defendant lived in the same house; that their bed-chambers were adjoining to each other; and that there was a communication between them by a door. Mrs. Cibber used to undress herself in her husband's room, and leave her clothes there, and putting on a bed-gown, retired to Mr. Sloper's room with one of the pillows taken from her husband's bed, Mr. Cibber shutting the door after her, and wishing her good night. It was proved also, that Mr. Cibber sometimes called Mr. Sloper and Mrs. Cibber up to breakfast. It is observable, that Lord Kenyon, at a time subsequent to that above-mentioned, viz. on the first trial of *Hoare v. Allen*, *Middlesex sittings after M. T. 41 G. 3. MSS.* stated this case correctly with the exception of the name of the Chief Justice. Lord Kenyon then said, "that *Cibber v. Sloper* was tried before Lord Mansfield, (Lee was Chief Justice) who thought the conduct of the husband so gross, that it was a case for small damages, but that it did not go to the ground of the action; since that time, however, it had been thought, that where the husband furnished means for the criminal intercourse, the action would not lie."

(5) It is to be observed, that although the opinion of Lord Kenyon, C. J. as delivered in *Sturt v. Marq. of Blandford*, coincided with the position in the text, yet the jury in that case found a verdict for the plaintiff, with 100*l.* damages.

(6) Lord Alvanley, C. J. differed in opinion with Lord Kenyon on this point: Lord A. thought that the infidelity or misconduct of the husband could not be set up as a legal defence to the adultery of the wife; that circumstance alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonour; in that case he could not complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. In a case of this kind, therefore, (*Bromley v. Wallace*, 4 Esp. N. P. C. 237.) Lord Alvanley directed the jury to consider evidence of infidelity in the husband, as going in mitigation of damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict.

So if the wife be suffered to live as a prostitute^g with the privity of the husband, and the defendant has thereby been drawn in to commit the act of which the husband complains, the action cannot be maintained (7). But if the husband has been guilty of negligence merely, or inattention to the behaviour and conduct of his wife with the defendant^h, not amounting to a consent, such circumstance will go in mitigation of damages only.

In an action for adultery with the plaintiff's wifeⁱ, it appeared that the plaintiff and his wife had agreed to live separately: the plaintiff proved several acts of adultery committed by the defendant after the separation of the plaintiff and his wife, but there was not any direct proof of adultery before the separation. Lord Kenyon, C. J. being of opinion that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice.

In a recent case^k, where the husband and wife had entered into a deed of separation with trustees, and the wife was living separate from the husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse, Lord Ellenborough, C. J. said that he did not consider the question, "whether the mere fact of separation between husband and wife by deed, was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife," as concluded by the preceding decision in *Weedon v. Timbrell*. But in the case then before the court, the court being of opinion, that taking the whole deed into consideration, it was evident, that the only separation in the contemplation of the parties, was a separation *with the approbation of the trustees*; and that, as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from the husband *by his consent*,

^g Per Lord Mansfield, C. J. in *Smith v. Allison*, Bull. N. P. 27. ⁱ *Weedon v. Timbrell*, 5 T. R. 357.
^h *Hodges v. Windham*, Peake, N. P. C. 99. ^k *Chambers v. Caulfield*, 6 East's Rep. 244.
ⁱ Agreed by the court, in *Duberley v. Gunning*, 4 T. R. 651.

(7) "If the wife is a prostitute, and the husband is not privy to it, it goes only in mitigation of damages." Per de Grey, C. J. in *Howard v. Burstonwood*, and Buller's N. P. 27. S. P.

and consequently the event and situation provided for in the deed had not happened; and in that view of the case, there could not be any question, but that the plaintiff's right to recover was not affected by the deed; and further, if the wife had left the husband with the approbation of the trustees, yet, as the deed had provided "that the wife might have the care of the younger children of the marriage, and visit the others, more especially when they should be ill, so as to require the attention of a mother," the husband had not in this case, (as it was holden that he had done in the case of *Weedon v. Timbrell*) given up all claim to the benefit to be derived from the society and assistance of his wife; consequently, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action.

Where several defendants have carried on an adulterous intercourse with the plaintiff's wife, the plaintiff may maintain separate actions, although the cause of action has accrued during the same period¹.

II. *Of the Venue—Declaration—Plea.*

THIS is a transitory action; and, consequently, the venue may be laid in any county, subject, however, to being changed, upon the usual affidavit, that the whole cause of action arose in another county, and not elsewhere out of such other county. Although the marriage be a material inducement to the right of the plaintiff, to maintain the action in respect to the trespass on the wife, yet it forms no part of the cause of action: the trespass committed on the wife constitutes the whole cause of action.²

The declaration in this action is very concise; in substance it is as follows: viz. that the defendant, *with force and arms*, made an assault on the wife of the plaintiff, and debauched and carnally knew her, whereby the plaintiff wholly lost and was deprived of the comfort, society, and fellowship of his wife, and of her aid and assistance in his domestic affairs, and other lawful business.

¹ *Gregson v. M'Taggart*, 1 Camp. N. P. C. 415.

² *Guard v. Hodge*, 10 East, 32.

The general issue in this action is, not guilty.

The statute of limitations (8) may be pleaded in bar of this action; but the gist of the action being the injury sustained by the husband in consequence of the adultery, the proper plea under that statute is, not guilty within six years^a.

In a late case^b where the plaintiff complained "of a plea of trespass, that the defendant, with force and arms, assaulted and seduced the plaintiff's wife, *per quod consortium amisit, &c. contra pacem, &c.*" and the defendant pleaded not guilty within six years; on general demurrer, a question arose, whether the action was trespass or case. *Cooke v. Sayer* was cited. Lord Ellenborough, C. J. said, it might be material to consider that point, if the question were, whether the limitation of six or four years *only* applied to this case: but the defendant having taken the longer period, and pleaded not guilty within six years, that of course must include not guilty within four years, and the plea not having been specially demurred to, was therefore good in either way of considering it; he added further, that he did not know what his opinion would have been if the point had then first arisen; but it having been considered in *Cooke v. Sayer*, as an action on the case, he should be inclined so to consider it. Lawrence, J. cited the case of *Parker v. Ironfield*, in which Buller, J. had considered an action of a similar nature for the seduction of a daughter, *per quod servitium amisit*, as an action on the case. Le Blanc, J. did not give any opinion as to this point; but observed, that the action before the court, be it either case or trespass, was within the statute of limitations; therefore, in either way of considering it, the plea was a good bar [not being specially demurred to.]

^a *Cooke v. Sayer*, 6 East's Rep. 388.
^b *Hurr. 788*, *Dall. N. P. 29*.
^c *Macfarlane v. Olivant*, 6 East's Rep

387. But see *Woodward v. Walton*, ante, p. 9, and *Ditcham v. Bond*, 2 Maule and Selwyn, 436.

By stat. 21 Jac. 1. c. 16. s. 3. all actions on the case (other than for slander) must be commenced and sued within six years next after the cause of such action; and actions of trespass, of assault, battery, wounding, and imprisonment, within four years. It appears, from the language of the court in *Cooke v. Sayer*, 6 East's R. 388. that they considered the action for adultery as falling within the former description of actions, and consequently that the limitation of time was six years. But see ante, p. 9.

III. Of the Evidence, and herein, of the Marriage Act, 26 G. 2. c. 33.

IN other actions, evidence of cohabitation, general reputation, acknowledgment of the parties, and reception by their friends, is sufficient to establish the relation of husband and wife. But in this action, in order that it may not be converted to bad purposes, by persons giving the name and character of wife to women to whom they are not married, it has been holden to be indispensably necessary for the plaintiff to prove the marriage ceremony having been performed, either by the testimony of some person who was present at the marriage, or by the production of the register, or of an examined copy thereof.

Such strictness being required as to the proof of marriage in this action, it will be necessary to make some remarks touching marriage in general, in order that the reader may be apprised of the solemnities which the law deems essential to constitute a valid marriage.

At the common law^a, any contract made *per verba de presenti*, or in words of the present, or in case of cohabitation, *per verba de futuro* also, between persons able to contract, was deemed a valid marriage to many purposes, and the parties might have been compelled in the spiritual courts to celebrate it *in facie ecclesie*. In order to constitute a valid marriage, before the marriage act, it appears to have been wholly immaterial whether the ceremony was performed by a protestant or a Roman catholic priest, in a private lodging or a public chapel. In the case of the King v. Fielding, 5 St. Tr. 614. the marriage ceremony was performed in a private lodging by a Roman catholic priest, in the year 1705; and upon evidence that the prisoner, in answer to the question whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband; Mr. Justice Powel, upon a question of felony, considered it as a marriage contracted *per verba de presenti*; in like manner as it was considered by Lord Holt in *Jesson v. Collins*, Salk. 487. and 6 Mod. 155.

^p *Morris v. Miller*, 4 Burr. 2057. ^q See *R. v. Inhabitants of Brampton*,
1 Bl. R. 632, S. C. and Bull. N. P. 27. 10 East, 282.
and per Lord Mansfield, C. J. in *Birt*
v. Barlow, Doug. 174. S. P.

See further on this subject *R. v. Brampton, post. n. (17)*. It appears doubtful, whether, at the common law, it was necessary that the ceremony should have been performed by a person in holy orders; (see the argument in *R. v. Luffington*, 1 Burr. S. C. 232. and some remarks on this point, 1 Bl. Com. 439.) certainly the ecclesiastical law required it, and if a husband demanded a right in the ecclesiastical court, which was only due to him by the ecclesiastical law, it was necessary for him to prove in that court, that he had been married by a person in holy orders. *Haydon v. Gould*, Salk. 119. Having endeavoured to explain the rules of law which prevailed, prior to the marriage act, it becomes necessary to set forth the provisions of that important statute, in order that the reader may obtain an accurate knowledge of the alterations, which have been made in the law on this subject.

From the preamble of this statute (sometimes termed Lord Hardwicke's Act, but more frequently the marriage act) it appears to have been made for the purpose of preventing the mischiefs and inconveniences, which had arisen from clandestine marriages. The provisions are as follow:

First, all banns shall be published in the parish church*, or in a public chapel *in which banns have been usually published* (9), belonging to the parish or chapelry wherein the

r Stat. 26 Geo. 2. c. 33.

s S 1.

(9) Upon these words a question arose, in the year 1781; whether this statute was to be construed to mean such chapels, wherein banns were usually published at the time when the marriage in question took place, or such chapels only as existed at the time of passing the act. The Court of King's Bench were of opinion, that the legislature clearly meant chapels existing at the time of the act; and, consequently, that a marriage, celebrated in a chapel erected since the statute 26 Geo. 2. c. 33. was void, although banns had been frequently published there, and marriages *de facto* celebrated there previously to the marriage in question. *R. v. Inhabitants of Northfield*, Doug. 658. As soon as the determination of the court in this case was known, Lord Beauchamp introduced a bill into parliament, which passed into a law, for making all marriages, which had been celebrated in any parish church, or public chapel, erected since stat. 26 Geo. 2. c. 33. and consecrated, valid in law, and to exempt the clergymen, who had celebrated such marriages, from the penalties of that statute. *Vide* 31 Geo. 3. c. 53. The operation of the stat. 31 Geo. 3. c. 53. not being prospective, a similar provision was made by stat. 44 Geo. 3. c. 77. in respect of marriages solemnized before the 25th of March, 1805, in any church, or pub-

persons to be married reside, upon three Sundays preceding the marriage; and, if the parties dwell in different parishes or chapelries, then the banns are to be published in the church or chapel belonging to the parish or chapelry, wherein *each* of the persons dwell; if both or either dwell in an extra-parochial place having no church or chapel, then the banns are to be published in a church or chapel belonging to the adjoining parish, and in such case the clergyman shall certify the publication in the same manner as if either of the

lic chapel in England, &c. erected since the making the statute 36 Geo. 2. and consecrated; and in like manner as by the last-mentioned act (21 G. 3. c. 53. s. 3.) registers of these marriages, or copies thereof, are to be received in evidence in courts of law and equity: *provided*, that in all such courts the same objections shall be available to the receiving such registers or copies in evidence, as would have been available to the receiving the same as evidence, if such registers or copies had related to marriages solemnized in parish churches, or public chapels, in which banns were usually published before, or at the time of passing the act 26 G. 2. And by stat. 48 G. 3. c. 127. the same provisions have been made in respect of marriages solemnized before August 23d, 1808, in any church, &c. with this farther enactment, "that the registers of all marriages solemnized in any public chapels, thereby enacted to be valid, shall, within thirty days next after the 23d of August, 1808, be removed to the parish church of the parish in which such chapel shall be situated; and, in case such chapel shall be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by stat. 26 G. 2.; and within 12 months after the removal of such registers to such parish churches respectively, two copies thereof respectively shall be transmitted by the respective churchwardens of such parishes to the bishop of the diocese, or his chancellor, subscribed by the hands of the minister and churchwardens, to the end that the same may be faithfully preserved in the registry of the bishop."

N. In cases where the marriage has been solemnized in a chapel, the plaintiff ought to be prepared with the registers and other evidence, to show that banns are, and have been usually published there, in order to found a presumption, that it is a chapel in which marriages may be lawfully solemnized according to the provisions of the marriage act. But in *Taunton v. Wyborn*, 2 Camp. N. P. C. 297. it was holden *prima facie* sufficient for this purpose to produce an old register of marriages solemnized in the chapel before the passing of the marriage act, and a register of banns published there since, and to prove, by living witnesses, that marriages had been solemnized, and banns published there of late years.

parties* dwelt in such parish: and, further, it is required, that the marriage shall be solemnized in one of the parish churches or chapels, where the banns have been published.

Notice shall be given^t to the minister of the true christian and surnames, places of abode within the parish, &c. and time of residence there, of the parties seven days before the publication of the banns; otherwise the minister shall not be obliged to publish them. N. A person whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married, by that name only from the time of his first coming into the parish till his marriage, which was about three years; it was holden, that the marriage was valid^u. So where a person had gone by an assumed name for sixteen weeks, in order more effectually to conceal himself, having deserted from the army, and then was married by his assumed name by licence; the marriage was holden good, no fraud being intended in respect of the marriage. R. v. Burton on Trent, 3 M. and S. 537.

No minister* shall be punishable by ecclesiastical censures for solemnizing marriages, where both or one of the parties are under 21, after banns published, if the parents or guardians (whose consent is required by law) do not give notice of their dissent; if, however, such parents or guardians, or one of them, publicly declare their dissent at the time of publication, then the banns will be void.

Licences shall be granted^v to solemnize marriages in the church or chapel of the parish or chapelry only, within which the usual place of abode of one of the parties shall have been for four weeks before the marriage; or where both or either of the parties dwell in an extra-parochial place, then in the church or chapel of the adjoining parish or chapelry (10). N. Parishes, having no parish church or

^t S. 2.

^u R. v. Billingshurst, 3 Maule and Selwyn, 250.

^x S. 3.

^y S. 4.

(10) Notwithstanding the provisions in the 2d section, and in this section, as to the residence of the parties, it is to be observed, that after the solemnization of any marriage, either by banns or licence, it is not necessary, in support of such marriage, to give any proof of the residence of the parties; nor is evidence to the contrary admissible. See the 10th section of this statute.

chapel*, or none where divine service is usually celebrated every Sunday, are deemed extra-parochial.

The archbishop of Canterbury's right of granting^a special licences to marry at any convenient time or place is expressly reserved to him.

Persons convicted of solemnizing matrimony^b in any other place than a church or public chapel, where banns have been *usually published* (11), except by special licence; or of solemnizing matrimony without publication of banns, except by licence from persons duly authorised to grant the same, are to be deemed guilty of felony, and shall be transported for 14 years; the prosecution for such felony having been commenced within three years after the offence committed; and *all marriages solemnized after 25th March, 1754, in any other place than a church, or such public chapel, unless by special licence, or solemnized without publication of banns or licence from a person duly authorized to grant the same, shall be void.*

After the solemnization^c of any marriage by banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes wherein the banns were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks, was in the parish where the marriage was solemnized; nor shall any evidence in either of the said cases, be received to prove the contrary in any suit touching the validity of such marriage.

"All marriages solemnized^d by *licence*, where either of the parties, not being a widower or widow, is under the age of 21 years, without the consent of the father of such of the parties so under age (if then living) first had, or if ~~dead~~, of the guardian of the person of the party so under age, lawfully appointed, or one of them: and if there be no such guardian, then of the mother (if living and unmarried); or if there be no mother living and unmarried, then of a guardian of the person appointed by the Court of Chancery, shall be void."

An illegitimate child has been holden to be within the

z s 6.

a s. 5

b s 9.

c s 10

d s. 11.

(11) See note 9.

meaning of this clause (*R. v. Hodnett*, 1 T. R. 96.) Whether the consent of the putative father, or of the natural mother be sufficient to give validity to the marriage of such child, appears to have been a *verata questio*. In *R. v. Edmonton*, B. R. E. 24 G. 3. 2 Bott. 76, pl. 114, and cited in 1 T. R. 97, it was holden, that the consent of the putative father was sufficient; but in *Horner v. Lydiard*, and *Daniel v. Cooke*, Sir William Scott was of opinion, that the consent could only be given by a guardian appointed by the Court of Chancery. The same question was submitted to the consideration of the Court of King's Bench, in the case of *Priestly v. Hughes*, sent by the master of the rolls. After the case had been twice argued, three judges, viz. Lord Ellenborough, C. J. Le Blanc, and Bayley, Js. certified*, that they were of opinion, that all marriages, whether of legitimate or illegitimate persons, are within the general provision of this statute, and that the consent of the natural mother is *not* a sufficient consent within the preceding section. Grose J. certified, that it seemed to him from the words of the 11th section, that the legislature had in their contemplation such legitimate children who had, or might have, either parents to consent to the marriage of such children, or guardians whom the legislature intended to substitute for such parents, under different circumstances; and that they had not in their contemplation to provide for the marriages of illegitimate children, whose parents could not legally forbid the banns, if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th section, i. e. legitimate parents, if they were to be married by licence.

The 12th section, contemplating the possibility of the guardian or mother of the parties being *non compos mentis*, or in parts beyond the seas, or that they may be induced unreasonably, or by undue motives, to abuse the trust reposed in them, enacts, that in such cases the party desirous of marrying may apply, by petition, to the chancellor, lord keeper, or lords commissioners of the great seal, who may proceed in a summary way; and if the marriage proposed shall appear to be proper, may by order of court, declare the same to be so, and such order shall be as good as if the guardian or mother of the party petitioning had consented to such marriage.

No suit or proceeding shall be had in any ecclesiastical court, in order to compel a celebration of any marriage in

facie ecclesie, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro* (12).

"The church⁵ and chapel wardens of every parish or chapel shall provide proper books, in which all marriages and banns of marriages respectively, there published or solemnized, shall be registered (every page of which is to be regularly numbered and lined at proper distances, in the manner therein mentioned,) and shall respectively be signed by the parson, vicar, minister, or curate, or by some other person in his presence, and by his direction; and all such books shall belong to every such parish or chapel and be kept for public use."

In order to preserve⁶ the evidence of marriages, and to make the proof thereof more certain and easy, "all marriages shall be solemnized in the presence of two or more witnesses, besides the minister; and immediately after such celebration, an entry thereof shall be made in such register, in which it shall be expressed, that the marriage was by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians, and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses," which entry is directed to be in the form, or to the effect therein set forth. N. An omission in the entry will not affect the validity of the marriage. R. v. St. Devereux, Burr. Set. Cases, 506. 1 Bl. R. 367. S. C.

Persons convicted⁷ of knowingly and wilfully inserting a false entry in the register of any thing relating to any marriage, with intent to elude the force of the act, or of falsely making, altering, forging, or counterfeiting, or of assisting in falsely making, &c. such entry, or of falsely making, &c. any licence, or of publishing as true any false, &c. register or copy thereof, or any false, &c. licence, knowing such register or licence to be false, &c. or of wilfully destroying any register of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of this act, shall be guilty of felony without benefit of clergy (13).

g S. 14.

h S. 15.

i S. 16.

(12) See the common law on this point, ante p. 15.

(13) See further provisions as to registers of marriages, &c. 52 G. 3. c. 140. But this act is not to repeal any of the provisions in the marriage act. See the last clause, s. 20.

Lastly, it is provided, that this act shall not extend to any of the marriages of any of the royal family; or to Scotland (14), or to marriages among Quakers or Jews (15), where both the parties are Quakers or Jews (16), or to marriages beyond the seas (17).

(14) Scotland being excepted, the intention of the statute, so far as it provided for annulling the marriages of minors without the consent of parents or guardians, has been frequently evaded by going into Scotland to be married there, and returning into England immediately afterwards. The validity of these Scotch marriages appears to have been established by a decision of the Court of Arches, which was afterwards confirmed in the Court of Delegates. See Hargrave's note to Co. Litt. 79. b. n. (1.)

(15) It seems, that to prove a Jewish marriage, it is not sufficient to produce witnesses who were present at the ceremony in the synagogue; because that is merely a ratification of a previous written contract—such contract, therefore, must be adduced and proved. *Horn v. Noel*, 1 Camp. N. P. C. 61. A Jewess may give parol evidence of her own divorce in a foreign country according to the ceremony and custom of the Jews there. *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17. Lord Kenyon C. J.

(16) It will be observed, that Anabaptists are not excepted. A case occurred before this act took effect, where the plaintiff, in an action for adultery, was an Anabaptist. Denison J. held, that as this is an action against a wrong doer, and not a claim of right, it was sufficient to prove the marriage according to the plaintiff's form of religion. *Woolston v. Scott*, Norfolk Lent Ass. 1753, coram Denison, J. Verdict for the plaintiff—Damages 500*l.* Bull. N. P. 28.

(17) A soldier on service with the British army in St. Domingo, in 1796, being desirous of marriage with the widow of another soldier, who had died there in the service, and both parties being desirous of celebrating their marriage with effect, they went to a chapel in a town where they were, and there the ceremony was performed by a person appearing there as a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the woman understood at the time to be the marriage service of the Church of England. After this they cohabited together as man and wife for 11 years, until the death of the husband. On a question as to the settlement of the woman, a doubt was raised whether the marriage was valid. The Court of B. R. were clearly of opinion, that it was a valid marriage, whether it was to be considered as a marriage celebrated in a place where the law of England prevailed, or as a marriage according to the law of St. Domingo, whatever that might be. Upon the former ground, inasmuch as there was a

Having thus detailed the several provisions of this most important statute, I shall resume the subject under discussion, namely, the evidence necessary to support the action for adultery.

In cases where the marriage is to be proved by the production of the register, or an examined copy, proof must also be adduced, if required, of the identity of the parties. In the case of *Birt v. Barlow*, Doug. 170. where a copy of the register was proved as evidence of the marriage, Blackstone J. was of opinion, that the plaintiff ought to go further, and prove the identity of the parties, and that such identity must be proved by the minister, or one of the subscribing witnesses to the register, unless their not being produced was accounted for in the same manner as was required in the case of subscribing witnesses to a deed; and, for want of this proof, the plaintiff was nonsuited. The Court of King's Bench set aside the nonsuit, admitting, however, that the copy of the register was not sufficient to prove the identity, but conceiving that in this case the minister and subscribing witnesses were not the only competent witnesses to prove the identity. And Buller J. observed, that it was not necessary to produce the original register, and that it was only where *that* was required, that subscribing witnesses must be called; that in this case the wife's maiden name was Harriot Champneys; and supposing a maid servant had proved, that she always went by that name till the day of the marriage; that she went out that day, and on her return and ever since had been called Mrs. Birt, that would have been evidence of the identity.

The books of the Fleet are not evidence of a marriage, either before the marriage act or since. So ruled by Ken-

contract *per verba de presenti*, which contracts were binding on the parties before the marriage act (which statute did not affect the present case, this being a marriage beyond the seas, and consequently within the exception), and because the marriage was celebrated by a person who publicly assumed the office of a priest, and appeared habited as such. Upon the latter ground, because upon the facts stated, every presumption must be made in favour of its validity, according to the law of the country where it was celebrated, the marriage ceremony having been performed there in a proper place, and by a person officiating as one competent to perform that function, and more especially as it had been followed by a cohabitation between the parties as man and wife for 11 years. *R. v. the inhabitants of Brompton*, 10 East, 282.

yon C. J. in *Reed v. Passer*, Peake's N. P. C. 231. 1 Esp. N. P. C. 213. S. C. S. P. per de Grey, C. J. in *Howard v. Burtonwood*, Middlesex Sittings after Trin. Term, 16 G. 3. and previously by Lord Hardwicke, and since by Le Blanc, J. in *Cooke v. Lloyd*, Salop, Summer Assizes, 1803, Peake's Evidence, Append. xxxvi. But in *Doe dem. Passingham v. Lloyd*, Salop, Summer Assizes, 1794, Heath, J. admitted these books in evidence; See further on the subject of these books, *Lloyd v. Passingham*, 16 Vesey, 59.

The confession of the wife is not evidence against the defendant; but conversations between her and the defendant may be given in evidence*. So letters written to her by the defendant are evidence *against* him; but the wife's letters to the defendant are not evidence *for* him.

In a modern case, where the plaintiff and his wife were servants^l, and necessarily living apart in different families, Lord Kenyon, C. J. was of opinion, that letters written by the wife to the husband, before any suspicion of the adultery, might be read as evidence of the connubial affection which subsisted between the plaintiff and his wife, observing, at the same time, that, before he admitted the letters to be read, he should require strict proof when, and under what circumstances they were written, in order to shew that at this time there was not any suspicion of misconduct in the wife.

In *Hoare v. Allen*^m, a witness was called by the husband to prove the representation made by the wife to him of the place to which she was going previously to her elopement, in order to remove all suspicion of connivance on the part of the husband. The Court of King's Bench were of opinion, that this evidence being part of the *res gesta*, was therefore admissible.

^k *Baker v. Morley*, M. D. London Sittings, 30 June, 1741, Lee Ch. J. special jury. Verdict for defendant. Bull. N. P. 28. S. C.

^l *Edwards v. Crock*, 4 Esp. N. P. C. 39. Kenyon, C. J.

^m *Hoare v. Allen*, 3 Esp. N. P. C. 276.

IV. *Of the Damages.*

THE damages given by the jury in this action are, in general, proportioned to the degree of the injury. Circumstances of aggravation of the injury, and which may therefore operate as an inducement with the jury to give large damages, are, the plaintiff's having lived happily with his wife before her connection with the defendant^a, the unblemished character, and antecedent virtuous behaviour of the wife, a provision having been made for the children of the marriage by settlement or otherwise, and other similar topics which the extraordinary circumstances of the individual case may furnish. Proof is frequently adduced of the defendant being a man of fortune, by calling his banker, or producing a settlement, under which he may be entitled to any estate, real or personal.

Circumstances of extenuation, on the part of the defendant, and which may tend to the mitigation or diminution of the damages are, the plaintiff's ill usage, or unkind treatment of his wife, evidence of his intolerable ill temper, of his having turned his wife out of his house^b, and refused to maintain her, &c. previously to the adulterous intercourse; gross negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant^c, the wanton manners of the wife, or first advances made by her to the defendant^d, a prior elopement of the wife and adulterous intercourse with another person, or having had a bastard before marriage^e; because by bringing the action the husband puts the general behaviour of the wife in issue. So letters written by the wife to the defendant, before his connection with her, soliciting a criminal intercourse^f, &c. may be given in evidence. But the defendant will not be permitted to prove acts of misconduct of the wife subsequent to the commission of the act complained of in the action^g.

Although the damages recovered are under forty shillings, yet the plaintiff shall be entitled to full costs^h; this

^a Bull. N. P. 37.

^b Bull. N. P. 37.

^p Per Bull. J. in *Duberley v. Gunning*, 4 T. R. 657.

^q Per Lord Ellenborough, C.J. in *Gardiner v. Jadis*, March 2, 1805, London Sittings.

^r *Roberts v. Malston*, Hereford, 1745,

per Willes, C. J. *Gilb. Evid.* 113. Ed. 1761. Bull. N. P. 396. S. C.

^s Per Lord Kenyon, C. J. *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

^t Per Lord Kenyon, C. J. S. C.

^u *Batchelor v. Bigg*, 3 Wils. 319. 2 Bl. R. 364. S. C.

action not being within the statute 22 and 23 Car. 2. c. 9. (18).

It has been supposed, that in this action a new trial cannot be granted for excessive damages^x; but in the case of *Chambers v. Caulfield*, 6 East, 256, Lord Ellenborough, C. J. delivering the opinion of the court said, that if it appeared to them, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives, or some gross error or misconception on the subject, the court would think it their duty to submit the question to the consideration of a second jury.

x See *Wilford v. Berkeley*, 1 Burr. 609. *Duberley v. Gunning*, 4 T. R. 651.

(18) See this statute, in the following chapter.

CHAP. III.

OF ASSAULT AND BATTERY.

- I. *Of the Nature of an Assault and Battery, and in what Cases an Action for an Assault and Battery may be maintained.*
- II. *Of the Declaration.*
- III. *Of the Pleadings.*
- IV. *Of the Verdict and Judgment.*
- V. *Of the Costs.*

-
- I. *Of the Nature of an Assault and Battery, and in what Cases an Action for an Assault and Battery may be maintained.*

AN assault is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing manner^a; striking at another with a cane or stick, though the party striking misses his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach^b; or by any other similar act, accompanied with such circumstances as denote at the time an intention (1), (coupled with a present ability) of using

^a Finch's Law, B. 3. c. 9. 1 Hawk. ^b Genuer v. Sparks, 6 Mod. 173, 4. and P. C. c. 62. §. 1. Salk 79.

(1) Whether the act shall amount to an assault, must in every case be collected from the intention. Trespass for assault: *Plea, non assault demesne*. Replication, *de injuriâ sud propriâ*. The defendant and another person were fighting, and the plaintiff came

actual violence against the person of another. For an assault, which is considered as an inchoate violence, the law has provided a remedy by an action of trespass *vi et armis*, at the suit of the injured party, for the recovery of damages, commensurate to the injury sustained (2).

A battery, which always includes an assault^c, is an injury inflicted on the person by beating, either with the hand or an instrument. The form of action prescribed by law, in the case of battery, is the same as that in assault, viz. an action of trespass *vi et armis*. In order to maintain this action, it is immaterial, whether the act of the defendant be wilful or not (3). Hence this action lies against a soldier who hurts one of his comrades while they are exercising, unless the defendant can shew such circumstances as will make it appear to the court, that the injury done to the plaintiff was inevitable^d, and that the defendant was not chargeable with any negligence: the merely pleading that the defendant committed the injury *casualiter et per infortunium et contra voluntatem suam* is not sufficient, for, no man shall be excused of a trespass, unless it may be judged utterly without his fault.

The defendant was uncocking a gun^e, and the plaintiff

^c Termes de la ley Battery, Com. Dig. d Weaver v. Ward, Hob. 134.
Battery. ^e Underwood v. Hewson, Str. 596.

and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. The plaintiff's counsel offering to enter into this evidence, it was objected on the other side, that the plaintiff ought to have replied this matter specially; but Legge, Baron, overruled the objection, observing, that the evidence was not offered by way of justification, but for the purpose of shewing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury.—Griffin v. Parsons, Gloucester Lent Assizes, 1754. MSS.

(2) For the law relating to indictments for assault and battery, see 1st Hawk. P. C. ch. 62. s. 1. 2. 1st East's P. C. ch. 8. s. 1. It must be observed, that the party injured may proceed against the defendant by action and indictment for the same assault, and the court, in which the action is brought, will not compel the plaintiff to make his election, to pursue either the one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party, in the civil action, are perfectly distinct in their natures.—Jones v. Clay, 1 Bos. and Pul. 191.

(3) Neither does the degree of violence with which the act is done make any difference. Per Le Blanc, J. 3 East's Rep. 602.

standing to see it, it went off, and wounded him: it was holden, that the plaintiff might maintain trespass.

This action lies not only against him who commits the injury, but against him also at whose command it is done^f: hence if A command B to beat another person, and B does it accordingly, A is guilty of the trespass as well as B. Although the plaintiff declares for an assault and battery, yet he may recover for the assault only^g.

Although a plaintiff has been indicted for a felonious assault, by stabbing, and acquitted, the party injured may, notwithstanding, sue him for damages in a civil action, if there has not been any collusion in procuring the acquittal^h; and the same rule holds after indictment and convictionⁱ.

II. Of the Declaration.

THIS is a transitory action^k, and consequently the venue may be laid in any county^l, except where it is otherwise directed by statute; as, where the action is brought against justices of the peace, mayors, or bailiffs of cities, or towns-corporate, head-boroughs, port-reves, constables, tithing-men, churchwardens, overseers of the poor, &c. or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity; in these cases, the venue, by stat. 21 Jac. 1. c. 12. s. 5. must be laid in the county where the facts were committed; otherwise the jury, who try the cause, shall find the defendant not guilty, without any regard to any evidence given by the plaintiff touching the trespass, battery, &c.

The provisions of the preceding statute having been found to be salutary, they have, by a late statute, (42 G. 3. c. 85. s. 6.) been extended to all persons holding a public employment, or any office, station, or capacity, civil or military, either in or out of the kingdom, and who, by virtue of such employment, have power to commit persons to safe custody; provided that, where any action shall be brought against such persons in this kingdom for any thing done out of this kingdom, the plaintiff may lay the act to have been done

^f 1 Roll. Abrid. 555. (V) pl. 2.
^g Lib. Ass. Anno. 22. fol. 99. pl. 60.
 Bro. Trespas, pl. 40.
^h Croshy v. Leng, 12 East, 400

ⁱ Adm. per Cur. S. C.
^k Litt. Sect. 485,
^l Corbett v. Barnes, Cro. Car. 444,

in Westminster, or in any county where the defendant shall reside.

Actions brought against any persons for any thing done by any officer of the excise^m or customsⁿ, or others acting in their aid, in execution, or by reason of their office, must be laid and tried in the county where the facts were committed.

'The day is not material^o, neither is the defendant obliged to prove that the fact was committed on the day laid in the declaration. Proof of the trespass at any time before the commencement of the action is sufficient.

An assault, being one entire individual act, cannot be committed at different times, and consequently ought not to be stated in the declaration to have been so committed.

In trespass and assault, it was alleged in the declaration^p, that the defendant on such a day, and on divers other days and times between that day and the day of exhibiting the bill, made an *assault* on the plaintiff; the declaration was holden bad on special demurrer. But where the declaration stated that the defendant *assaulted* the plaintiff on divers days and times^q, it was adjudged good on special demurrer (4).

The declaration ought to allege the fact to have been committed *vi et armis*, and *contra pacem*. Doubts seem to have been entertained, whether the omission of these words was matter of form or substance, at the common law. But now, by stat. 16 and 17 Car. 2. c. 8. s. 1. the omission is aided after verdict; and by stat. 4 Ann. c. 16. s. 1. it is enacted, that no exception shall be taken in any court of record of the omission of *vi et armis*, and *contra pacem*, except the same shall be specially shown for cause of demurrer.

m 23 Geo. 3. c. 70. s. 34.

n 24 Geo. 3. c. 47. s. 35.

o Litt. Sect. 485. 1 Inst. 283. a.

p English v. Purser, B. R. 6 East's R.

395. recognising *Michell v. Neale*,
Cowp. 828.

q *Burgess v. Freelove*, C. B. 2 Bos.
& Pul. 425.

(4) From the report of this case of *Burgess v. Freelove*, it appears that the Court of Common Pleas did not consider *Michell v. Neale*, Cowp. 828, as a sound authority. But Lord Ellenborough, C. J. in *English v. Purser*, took a distinction between the words "made an assault" in *Michell v. Neale*, and the word "assaulted" in *Burgess v. Freelove*, on the ground that the latter might mean that the defendant committed so many different assaults on the different days, admitting however that the distinction was very nice. This distinction certainly was not adverted to by the court in *Burgess v. Freelove*.

The declaration ought to allege the commission of the fact positively, and not by way of recital, e. g. for *that* on such a day the defendant made an assault on the plaintiff, and not for *that whereas, &c.* Formerly it was usual, in the Court of King's Bench, to arrest or reverse judgments for declaring in trespass by way of recital, or, as it was then called, the pleadings being in Latin, with a *quod cum*. But now the court will permit the plaintiff to amend the declaration by a bill filed right, the time of filing which bill the court will not inquire into.

In *Parker v. Tanswell*, B. R. M. 14 G. 3. 10 MS. 347, Serj. Hill's Coll. in Lincoln's Inn Library, an amendment of this kind was permitted after a judgment by default, the court saying that they hoped the objection on the *quod cum* would now be at rest.

In proceedings by original, where the writ is set out in the declaration, the count is helped as to this defect, and made good by the writ.

If the declaration contains only one count, the plaintiff, after proving one assault, cannot wave that, and proceed to give evidence of another.

III. Of the Pleadings.

THE general issue to an action of assault and battery is not guilty, which constitutes a proper issue, in case the defendant has not committed the injury complained of.

By stat. 7 Jac. 1. c. 5, "In any action upon the case, trespass, battery, or false imprisonment, against any J. P. mayor, bailiff, constable, &c. for any thing done by virtue of their offices, and against all others acting in their aid or assistance, or by their command concerning their offices, they may plead the general issue, and give the special matter in evidence."

The preceding statute was made perpetual by stat. 21 Jac. 1. c. 12. and extended to churchwardens, overseers of the poor, and others acting in their aid or by their command.

r *Brigs v. Sheriff*, Cro. Eliz. 507
s *Wilder v. Handy*, Str. 1151. Marshall
v. Riggs, Str. 1162.

t *White v. Shaw*, 2 Wils. 203. adjudged on special demurrer.
u *Stante v. Prickett*, 1 Comp. N. P. C. 473.

Justification in Defence of Person.—If the plaintiff was the aggressor, and the injury of which he complains was occasioned by his own assault on the defendant, so that the act of the defendant became necessary for the defence of his person, the action cannot be maintained^x, because the law will permit any degree of violence to be justified, if it be necessary for the safety of the person. This defence or justification, which is the most usual in this action, and which is technically termed *son assault demesne*, must be pleaded specially (5)^y.

In like manner a defendant may justify an assault and battery in the defence of his wife^z (6), child (7), or servant^a (8). So a wife may justify in defence of her husband^b, a child of a parent, and a servant in defence of the person of his master^c. It must be observed that where a servant justifies in defence of his master, it ought to be alleged in the plea that the plaintiff would have beat the master, if the servant had not interposed. In trespass^d, assault, and battery, against A and B, A pleaded *son assault*, and B pleaded that he was servant to A, and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff. On demurrer, the plea was holden ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master if the servant had not interposed, *prout ei bene licuit*. Judgment for the plaintiff.

Justification in Defence of Possession.—So a defendant may justify in defence of his possession^e: as if A enter the close of B unlawfully, B having first requested (9) A to

x Cockroft v. Smith, Salk. 649.

y 1 Inst. 282. b. 283. a.

z 2 Rol. Abr. 546 (D) pl. 1. Bro. Trespass, pl. 128.

a 2 Rol. Abr. 546. (D) pl. 2.

b Leward v. Basely, Ld. Raym. 62.

c 2 Rol. Abr. 546. (D) pl. 3. Adm. per.

Cur. in Ld. Raym. 62, and Salk. 407.

d Barfoot v. Reynolds and another, Str. 953.

e 2 Rol. Abr. 549. (G) pl. 2.

(5) See the form, Co. Entr. 2d ed. 644. a.

(6) Winch's Ent. ed. 1680. p. 1121.

(7) Clerk's Assistant, p. 90, 91.

(8) In Leeward v. Basely, Salk. 407. and Ld. Raymond, 62. it was said by the court, that a master could not justify an assault in defence of his servant, because the master might have an action *per quod servitium amittit*; which opinion is adopted in Bull. N. P. 18.

(9) Every *impositio manuum* is an assault and battery, which cannot be justified upon account of breaking the close in law without a previous request. Green v. Goddard, Salk. 641.

depart, may, on his refusal, justify laying his hand on A. in order to remove him^f. It must be observed, that B. ought not to begin with striking, or offering violence to A^g. for the law, in the first instance, merely allows B. in defence of his possession, to lay his hand gently on A. Hence a charge of beating, wounding, and knocking the party down, cannot be justified by a plea of *molliter manus imposuit*^h. If indeed A. should forcibly resist the endeavour, to remove him, it will then be lawful to oppose force to force, and any degree of violence which may be necessary in self-defence will be justifiable. If the entry of the close be forcible, as by breaking down a gate, or the like, a previous request is unnecessaryⁱ; for acts of violence, on the part of the trespasser, may be instantly opposed by such other acts of violence, on the part of the owner, as may be necessary for the immediate defence of his possession.

Trespass, assault, and battery, with a stick: the defendant pleaded as to the assault and battery, that he was possessed of a close, and that the plaintiff with force and arms, and with a strong hand as much as in him lay, did attempt and endeavour forcibly to break into and enter the said close of the defendant, whereupon the defendant resisted and opposed such entrance, and defended his possession as it was lawful for him to do, and that if any injury happened to the plaintiff, it was in defence of the possession of the close. Replication, *de injuriâ suâ propriâ absque tali causâ*, and issue found for the defendant. A motion was made to enter up judgment for the plaintiff, notwithstanding the justification in the said plea, which was found for the defendant, on the ground that the plea could not be supported, on the authority of *Jones v. Treadian*, 1 Mod. 36. where Twisden, J. said, "you cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter manus imponere*," &c. The case having been argued, Lord Kenyon, C. J. said, that the plaintiff could not succeed in his application, unless he could shew that the words *molliter manus imposuit* were mere technical words; that a party might resist and oppose force by force, in defence of his possession, if necessary: if the resistance were excessive, the plaintiff might shew that in a new assignment. Lawrence J. said "that the general form of pleading had been by *molliter manus imposuit*, and on this ground, that the defendant ought not, in the first instance, to begin with striking the plaintiff, but

^f See the form, 2 Lutw. 1105.

^g 2 Inst. 316.

^h *Gregory and Wife v. Hill*, 8 T. R. 699.

ⁱ *Green v. Goldam*, Salk. 651.

^k *Weaver v. Bush*, 8 T. R. 78.

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^f See the form, 2 Lutw. 1425.

^g 2 Inst. 210.

^h *Gregory and Wife v. Hill*, 8 T. R. 299.

ⁱ *Green v. Goldam*, Salk. 651.

^k *Weaver v. Eash*, 8 T. R. 78.

the law allows him either in defence of his person or possession to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from any thing stated in this plea, that the defendant did more than gently lay his hands on the plaintiff in the first instance; and if not, this plea may stand consistently with the authorities." Rule discharged.

In framing justifications in defence of possession, it is not necessary for the defendant to set forth the particulars of his title; it is sufficient to state that defendant was possessed, &c. for this is merely an inducement and conveyance to the substance of the plea.

Trespass of assault, battery, and wounding. The defendant pleaded to the wounding, not guilty¹, and to the assault and battery, that he was possessed of an house in such a parish for years; that the plaintiff entered his house, and would have thrust him out of possession thereof, whereupon he *molliter manus imposuit*, to put him out, and the harm, if any done, was in defence of his own possession. On demurrer, it was contended, that the defendant ought to have set forth particularly who made the lease, when it was made, and for how many years; but the court held the plea good, for the statement of the possession for years, was only an inducement and conveyance to the justification, the substance of which was, that he offered to thrust him out of the possession of his house, and that the title or interest not coming in question, it was not necessary that the allegation should be as certain as where a claim was made by the defendant.

The observations which have been made in respect of the defence of real property, apply also to the defence of personal property, for the protection of which the law will not permit violence to be offered in the first instance; and although it be not necessary in this case to request the person who has taken the property to restore it, yet, unless such property is seized, or attempted to be seized, *forcibly*, the owner cannot justify any thing more than gently laying his hands on the trespasser in order to recover it.

Justifications by Officers executing Process.—In like manner a sheriff's officer cannot justify any act more than laying his hand on another for the purpose of executing legal

¹ 1 Skevill v. Arcry, Cro. Car. 139.

process, unless acts of violence become necessary by a resistance on the part of the person apprehended, or an endeavour to rescue himself^a.

A battery cannot be justified by shewing an arrest merely^a, because an arrest may be made without touching the person, as if a bailiff comes into a room where the defendant is, and having locked the door, tells him that he is arrested, that is an arrest; for the defendant is in the custody of the officer.

It has been doubted, whether a defendant can justify a battery by stating that he gently laid his hands on the plaintiff in order to arrest him, and did arrest him. But this mode of pleading was adjudged to be good, in *Titley v. Foxall*, Willes, 688. And in *Tottage v. Petty*, Ca. Temp. Hardw. and MSS. where to trespass for assault and battery, the defendant as to the assault and battery pleaded, that the plaintiff entered his house without his leave, and there disturbed him, whereupon the defendant requested the plaintiff to quit his house, and because the plaintiff would not, the defendant gently laid his hands on the plaintiff to thrust him out: on demurrer, the case of *Williams v. Jones* was cited as an authority to shew that this plea was bad; but Lord Hardwicke, C. J. said, "It was not determined by us in *Williams v. Jones*, that a battery could not be justified by a *molliter manus imposuit*, but that it could not be justified by merely shewing an arrest." The court were clearly of opinion that the plea was good, and gave judgment for the defendant (10).

^a *Truscott v. Carpenter and Man*, n *Williams v. Jones*, Ca. Temp. Hard. Lord Raym. 299. *Williams v. Jones*, 298. Str. 1049. and Ca. Temp. Hard. 298. more fully reported.

(10) See an excellent note on this subject, and on the manner of pleading justifications of this kind by Serj. Williams, in *Green v. Jones*, 1 Saund. 296. "An officer cannot justify more than the assault, by virtue of the arrest, without shewing that the plaintiff resisted or endeavoured to rescue himself, unless it be by way of *mollitur manus imposuit*, and in that manner he may justify the beating without shewing any resistance or attempt to rescue." Bull. N. P. 19. cites *Titley v. Foxall*. In this case, however, as well as in the case of a plea of resistance, or an attempt to rescue it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by Kingsmill, J. in a case in 21 H. 7. "Que puis cel matter de ces mains le defendant batit le plaintiff." See Mr. Durnford's note on this subject in his valuable edition of Willes's Reports, p. 17. n (b.)

Regularly, when the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea^o.

Other Justifications.—The law looks with an indulgent eye on such acts of discipline as are necessary for the preservation of social order. Hence a master may moderately correct his servant, a parent chastise his child, and a schoolmaster his scholar^p. In like manner an officer may justify the moderate and reasonable correction of those who are placed under his command, if they disobey his orders.

The defendant may justify even a *maillie*^q, if done by him as an officer in the army for disobeying orders; and he may give in evidence the sentence of the council at war upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.

The several preceding instances of justifications must, as has been observed with respect to the justification of *son assault demesne*, be pleaded specially^r. In framing these pleas care must be taken that the battery be admitted and confessed; otherwise, on demurrer, the plaintiff will be entitled to judgment; for it is a rule of pleading that the party justifying must shew and admit the fact. The fact admitted must also amount in law to a battery *by the defendant*, otherwise it will not be tantamount to an admission, and the plea will be bad, as being in violation of the preceding rule; although the defendant might have succeeded, if he had pleaded the general issue. The following case will illustrate this position.

Trespass, assault, and battery. The defendant pleaded that he was riding on a horse in the king's highway^s, and that his horse being frightened, ran away with him, and that the plaintiff was desired to go out of the way, and did not, and the horse ran upon the plaintiff against the defendant's will. On demurrer the plaintiff had judgment, because the defendant had justified the battery, and yet had not confessed that which amounted to a battery by himself; for if the horse ran away against the will of the rider, it could not be said, with any colour of reason, to be a battery

^o 1 Inst. 283. a. *Matthews v. Cary*, 3 Mod. 137. 138. Carth. 73. S. C.

^p *Rastal's Entr.* 613. pl. 19. Ed. 2nd.

^q *Laure and Deberg*, H. 13. W. 3. per Treby C. J. London Sittings. Salk.

MS. Gibb. Ex. 47. Ed. 1761. Bull. N. P. 19. S. C.

^r 1 Inst. 282. b.

^s *Gibbous v. Pepper*, Salk. 637. and *Ld. Raym.* 33.

in the rider (11); it was admitted, however, by the court, that if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence.

Of local and transitory Justifications.—If the cause of the justification be local^a; as if a constable of a town in another county arrests the body of a man that breaks the peace, the constable may in his justification traverse the county in which the declaration is laid: but he must not only traverse that but all other places, saving in the town whereof he is constable^b. So if the declaration charge the defendant with an assault and battery in London, if the defendant justify in defence of his possession at Waltham in Essex, he ought to traverse every other place except Waltham^c. To traverse the parish and not the county will be bad on demurrer^d.

If the matter of the justification be transitory, it ought to follow the place laid in the declaration^e.

An action was brought for a battery at D., the defendant justified under the command of certain bailiffs executing legal process at S. in the same county. The plea was holden to be bad, for the bailiffs have authority throughout the whole county, the cause of justification was not local, so that the defendant ought to have justified in the same place in which the plaintiff had declared.

A battery in his own defence is not local^f, but may be justified in every place; consequently, such a justification, according to the preceding rule, must follow the place laid in the declaration.

If a justification be at the same time and place, it is needless to aver, that it is the same trespass^g.

Where the defendant pleads a local justification^h, the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure.

t 1 Inst. 282. a. b.

u Peacock v. Peacock, Cro. Eliz. 705.

x Bridgwater v. Bythway, 3 Lev. 113.

y Johnson v. Burton, Cro. Eliz. 860.

z 1 Inst. 282. a. b.

a Bridgwater v. Bythway, 3 Lev. 113.

b Purset v. Hutchings, Cro. Eliz. 842.

c King and ux. v. Phippard, Carth. 281.

d Serle v. Darford, Ld. Raym. 180. and Lutw. 1485.

(11) If A. beats the horse of B. whereby he runs against C., A. is the trespasser, and not B. So if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. Per Cur. Salk. 638. and Ld. Raym. 39.

To an action for an assault and battery, the defendant may plead, not guilty within four years next after the cause of action^e; but if he mistakes the limitation of time, and pleads, not guilty within six years, the plea will be bad on demurrer^f. From a recent case it appears that this demurrer must be special^g.

Of the Replication.—The usual replication to the preceding justifications where they consist merely of matter of fact, triable by the country, as *son assault demesne*, is, that the defendant committed the trespasses of his own wrong, and without the cause alleged by him in his plea. This is termed a replication *de injuriâ suâ propriâ absque tali causâ*.

If the defendant pleads *son assault demesne*^h, and the plaintiff can justify it, such justification ought to be pleaded specially; for it cannot be given in evidence under the general replication of *de injuriâ suâ propriâ*.

On the general replication of *de injuriâ suâ propriâ* to *son assault demesne*ⁱ, the plaintiff cannot give in evidence a battery at a day and place different from that laid in the declaration.

Hence if there were two assaults, one of which the defendant can justify, and the other not^k, the plaintiff must new assign the assault for which he brought his action (12), otherwise the defendant will be entitled to a verdict on his justification.

Where the plaintiff declares of a single act of assault and battery^l, to which the defendant pleads *son assault demesne*, the plaintiff cannot reply *de injuriâ suâ propriâ*, and also

^e 21 Jac. 1. c. 16. s. 3.

^f *Blackmore v. Tiddery*, Salk. 423. and Lord Raym. 1060.

^g *Macfadzen v. Olivant*, 6 East's R. 388.

^h *King and ux. v. Phippard*, Carth. 281.

ⁱ *Downs v. Skrymsher*, 1 Brownl. R. 233.

^k 3 Roll. Abr. 680. (C) pl. 3. *Walshy v. Oakley*, London Sittings after M. T. 40 Geo. 3. MSS. S. P. per Kenyon, C. J.

^l *Franks v. Morris*, 10 East, 81. n.

(12) "If there were two batteries on one day, and the one were on the plaintiff's own assault, and the other not, if the defendant will justify one *de son assault demesne*, the plaintiff may make a new assignment of the other battery," per Cur. in *Elwis v. Lombe*, 6 Mod. 120. A new assignment, however, in these cases, is only necessary where there is but one count in the declaration; for if the declaration contain as many counts as there were assaults, &c. and some of them cannot be justified, the plaintiff may prove those without a new assignment. Bull. N. P. 17.

new assign that the defendant beat the plaintiff in a more violent manner than was necessary for the defence of himself; because such replication *and* new assignment constitute in effect a double replication, which is not allowed by the rules of pleading.

IV. Of the Verdict and Judgment.

DAMAGES may be given in this action not merely for the corporal injury, which in many cases may be very small, but also for the degrading insult with which it is accompanied.

Against joint trespassers there can be but one satisfaction^m, and, therefore, if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages for all; and if all the issues are found for the plaintiff, the jurors ought not to sever the damages, for, if they do, the verdict will be vicious (13). And if, in such case, judgment be entered for the separate damages, such judgment will be erroneousⁿ. But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants, except one, and taking judgment against that one only^o.

So if joint defendants suffer judgment by default, and the plaintiff execute separate writs of inquiry against them, whereupon several damages are given, it is irregular; and if final judgment be entered for those damages, such judgment will be erroneous^p. But, before final judgment, the

^m Hob 66 Heydon's case, 5th Resol.
ⁿ 11 Rep 7
^o Crane v Hammerstone, Cro. Jac
 113. Hill v Goodchild, 5 Burr. 2791.

^p Rotney v Stride, Carth 19
 p Mitchell v Milbank, 6 T R 199

(13) On the trial of an action against two defendants A. and B. it was proved that the assault by A. was more violent than that by B. Lord Ellenborough C. J. told the jury that the damages could not be severed, so as to give more damages against A. than against B. but that they might give their verdict against both, to the amount which they thought the most culpable ought to pay. Brown v. Allen and Oliver, 4 Esp. N. P. C. 158.

court will permit the plaintiff, in order to cure the error, to set aside his own proceedings, upon payment of costs, and to issue a new writ of inquiry.

V. Of the Costs.*

By stat. 22 and 23 Car. 2. c. 9. (14) "In all actions of assault and battery, wherein the judge at the trial of the cause shall not certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover more costs than the damages so found shall amount unto."

Upon this statute, which does not extend to writs of inquiry, it must be observed, that a certificate of an assault only is not sufficient to entitle the plaintiff to full costs, and, consequently, although an admission on the record of a battery, by a justification of it, will supersede the necessity of a certificate, yet a similar admission of an assault only will not.

An injury to a personal chattel, although laid in the same declaration with an assault and battery, is not within the statute; but this rule holds only where such injury is a substantive and independent injury, and stated in a distinct and independent count; for where in trespass for an assault and battery and tearing plaintiff's clothes, the jury found that the tearing was in consequence of the battery, and gave less than forty shillings damages, it was holden that the plaintiff was not entitled to any more costs than damages. So where in an action of assault, and for tearing the plaintiff's clothes, the plaintiff recovered less than forty shillings, although

q Sheldon v. Ludgate, C.B.T. 3. Geo. 1.

Bull. N. P. 399.

r Smith v. Neesam, 2 Lev. 109.

s Smith v. Edge, 6 T. R. 462.

t Page v. Creed, 3 T. R. 391.

u Breenan v. Redmond, 1 Taunton's B. 16

u Milbourn v. Reade, 3 Wils. 322.

x Cotterill v. Tolly, 1 T. R. 655.

Hamson v. Ashdead, B. R. T. 27

Geo. 2. Bull. N. P. 329. and Sayer's

Rep. 91.

y Mears v. Greenaway, 1 H. Bl. 391

(14) Extended to courts of Great Sessions for Wales and Chester; Court of Common Pleas for county palatine of Lancaster, and Court of Pleas for county palatine of Durham, by stat. 11 and 12 W. 3. c. 9.

the declaration charged the tearing the clothes as a substantive fact, yet the tearing being stated in the same count with the assault and battery*, and alleged to have been done at the same time and place, it was holden that the plaintiff was not entitled to any more costs than damages; for the court will construe the declaration so as to accomplish the object of the statute, and after a general verdict, it will be intended that the tearing was found to be part of the same act, and a consequence of the battery.

By stat. 8 and 9 W. 3. c. 11. s. 1. "Where several persons are made defendants to any action or plaint of trespass (15), assault, or false imprisonment, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall have his costs in like manner as if a verdict had been given against the plaintiff and acquitted all the defendants, unless the judge, before whom such cause shall be tried, shall, immediately after the trial thereof in open court, certify upon the record under his hand, that there was a reasonable cause for making such person a defendant to such action*."

In assault and battery against several defendants, one let judgment go by default, and the others pleaded not guilty. On the trial, the jury gave damages against him who had suffered judgment by default, and found the other defendants not guilty. * Wilmot J. being desired to certify that there was a reasonable cause to make the others defendants, said, he thought the stat. 8 and 9 W. 3. c. 11. s. 1. did not extend to this case, but only to cases where some of the defendants are convicted by verdict, and others acquitted. In this case it is as if they had severed in pleading, and as if the action was against the others only; and on these grounds he refused to certify.

By stat. 8 and 9 W. 3. c. 11. s. 4. "In all actions of trespass, commenced or prosecuted in any of his Majesty's courts of record at Westminster, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the back of the record, that the tres-

^a Lockwood v Stannard, 5 T. R. 482 S. P.

^b Collins v Harrison and others, Worcester, Lent Ass 1757, MSS.

^a See Ferneaux v Fotherby, and another, 4 Campb. 137.

* i. e. trespass *vi et armis*; for it has been holden, that this statute does not extend to actions of trespass on the case, as for nuisance. Tipping v. Coot and Nutt, H. 8 G. 2. B. R. MSS. S. C. cited in Butler's N. P. 331, by the name of Dibbon v. Cook.

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"pass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages but full costs."

Of the Certificate under the 43 Eliz. to deprive the Plaintiff of Costs.—The preceding statutes enable plaintiffs, by means of the judge's certificate, to recover full costs; it remains only to mention the 43d Eliz. c. 6. s. 2. which empowers judges in all personal actions, not therein excepted, to deprive plaintiffs, by means of a certificate, which may be granted under certain circumstances, of the benefit of full costs.

The provisions of this statute are as follow: "If upon any action personal, brought in any of the king's courts at Westminster, not being for any title or interest of lands, (16) nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of forty shillings or above, the judges before whom any such action shall be pursued shall not award for costs to the plaintiff any greater costs than the amount of the debt or damages recovered, but less at their discretion."

In trespass for an assault and taking a rope, the jury gave eighteen-pence damages. And Mr. Justice Burnet, who tried the cause, certified according to st. 43 Eliz. c. 6. in order to deprive plaintiff of costs. The plaintiff however moved (as it was a new case) for costs *de incremento*, pretending that here was an *asportavit*, which, on the 22 & 23 Car. 2. c. 9. had been always holden to carry costs. But the court in this case refused to give costs, for the st. 43 Eliz. takes in all but a few excepted cases, of which this is not one. "And

c 43 Eliz. c. 6. s. 2.

d Walker v Robinson, Str. 1232, and 1 Wils 97.

(16) An action on the case, for a disturbance of or injury to the plaintiff's right of common, is not *necessarily* an action for any title or interest of lands; it may be brought in order to assert such title, or a right to such interest; or it may be brought against a mere wrong-doer, when the plaintiff's title to common is not disputed; or against another commoner, where there is no question on the right of either party: in the two last cases it is within the statute, and the judge may certify. *Edmonson v. Edmonson*, 8 East, 294.

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"the plaintiff has not been using any force or violence on his
"act, and we have no doubt it is intended (1721)

judgment at a certificate upon the statute
made after the trial of the cause, the time for
granting a certificate being fixed by the statute.

c Holland v. Gore, C. B. T. 32 Geo. 2 Sayer on Costs, 10.

(17) In *White v. Smith*, C. B. E. 17 Geo. 2. Willes, C. J. in an action for taking sand on Hounslow Heath, certified under this statute. A similar certificate was granted in *Bartlet v. Robbins*, C. B. E. 5 Geo. 3. in an action of assumpsit, and by Kenyon, C. J. in *Dand v. Sexton*, II. 29 Geo. 3. 3 T. R. 37. in an action of trespass *vi et armis* for beating a dog, although it was urged that the statute applied to those actions only which could be brought in the county court, and that consequently it did not extend to an action *vi et armis*. The Court of King's Bench concurred in opinion with Kenyon C. J. as to the propriety of granting this certificate, on the authority of the preceding cases. In *Emmet v. Lyne*, E. 45 G. 3. 1 N. R. 255. Sir J. Mansfield C. J. certified under this statute, in an action for false imprisonment; the court were of opinion, that the certificate was rightly granted, because an imprisonment did not necessarily include a battery. In *Edmonson v. Edmonson*, Carlisle Summ. Ass. 1806. Sutton, baron, certified in an action on the case for an injury done to the plaintiff's right of common by digging turves there; and the Court of King's Bench held, that the certificate was proper. See 8 East, 291. and ante. n. 16.

CHAP. IV.

OF THE ACTION OF ASSUMPSIT.

- I. *Of the Action of Assumpsit, and of the Agreement, for the Non-performance of which this Action may be maintained.*
- II. *Of the general Indebitatus Assumpsit.*
- III. *Of the Declaration.*
- IV. *Of the Pleadings,*
 1. *Of the General Issue, and what may be given in Evidence under it.*
 2. *Accord and Satisfaction.*
 3. *Infancy.*
 4. *Payment.*
 5. *Release.*
 6. *Statutes,*
 1. *Of Limitation.*
 2. *Of Set-off.*
 7. *Tender.*

- I. *Of the Action of Assumpsit, and of the Agreement, for the Non-performance of which this Action may be maintained.*

DEFINITION.—The action of assumpsit is an action of trespass on the case, whereby a compensation, in damages, may be recovered for an injury sustained by the non-performance of a parol agreement.

Agreements are distinguished, into agreements by spe-

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cialty, and agreements by parol. The law of England does not recognize any other distinction. If agreements are in writing, and not specialties, they are parol agreements.

The action of assumpsit is confined to agreements by parol, the action of covenant^b or debt being the proper remedy for the non-performance of agreements by specialty.

The essential parts of every parol agreement are, the promise or undertaking of one party, and the consideration on which such promise or undertaking is founded, proceeding from the other party. Sometimes the promise is expressed by the party, and sometimes it is raised by implication of law. In the former case, it is termed an express, in the latter, an implied promise. In parol agreements, the law will not imply a consideration; consequently, in actions of assumpsit, a consideration must be stated and proved (1).

Of the Consideration.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration (2), that is, a consideration either of benefit to the defendant^c, or of benefit to a stranger^d, or of damage, or of loss^e sustained by

^a Per Skynner, C. B. delivering the opinion of the judges in *Rann v. Hughes*, D. P. 14 May, 1778, 7 T. R. 351. n

^b *Bennet v. Guydley*, Cro. Jac. 505.
^c Per Buller, J. in *Nerot v. Wallace*, 3

T. R. 24. and *Cooke v. Oxley*, 3 T. R. 673

^d Per Gawdy and Fenner, Js. in *Greenleaf v. Barker*, Cro. Eliz. 194

^e Per Ellenborough, C. J. in *Bunn v. Guy*, 4 East's R. 194.

(1) Bills of exchange and promissory notes form an exception to this rule.

(2) It is worthy of observation, that Sir William Blackstone, in that part of the third volume of his Commentaries, wherein he treats of the action of assumpsit, has not either named, described, or even alluded to the consideration requisite to support an assumpsit: and what is more remarkable, the example put by him in order to illustrate the nature of the action is, in the terms in which it is there stated, a case of *nudum pactum*: "If a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, undertaking, or assumpsit." See 1 Roll. Abr. 9. l. 41. Doct. and Stud. Dial. 9. ch. 24. and *Elsee v. Gatward*, 5 T. R. 143. that an action will not lie for a mere nonfeasance, unless the promise is founded on a consideration. This remark ought not, neither was it intended, to derogate from the merit of a justly celebrated writer, who for comprehensive design, luminous arrangement, and

the plaintiff, *at the request* of the defendant: and herein the law of England adopts and recognizes the rule of the civil law, *ex nudo pacto non oritur actio*^f.

Any act of the plaintiff, from which the defendant derives a benefit or advantage, or any labour, detriment^g, or inconvenience sustained by the plaintiff, however small^h the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or ~~some~~ inconvenience suffered by the plaintiff, with the consentⁱ, either express or implied, of the defendant, or in the language of pleading, "at the special instance and request of the defendant." It is, however, clearly established, that the consideration must be of *some* value, in contemplation of law (3); for where A. in consideration that B. would make an estate at will to him, as his counsel should devise, promised, &c. it was holden a void promise, for want of a sufficient consideration, because B. might immediately determine his will^k.

So where the testator had committed to the care of the defendant his children^l, and the disposition of his goods, during their minority, *for their education*, and thereupon the defendant promised the testator to procure the assurance of certain lands to one of the testator's children, the consideration was holden insufficient; for the law would not in-

f 17-E. 4. 4 b. Plowd. 365 a. 308 b.

g Williamson v. Clements, 1 Taunt. 523.

h Sturlyn v. Albany, Cro. Eliz. 67.

March v. Culpepper, Cro. Car. 70.

See 4 Taunt. 611, and post. p. 48.

i Stokes v. Lewis, 1 T. R. 21. Child v.

Merley, 8 T. R. 610.

k 1 Roll Abr. 23. pl. 29.

l Smith v. Smith, 3 Leon. 88.

elegance of diction, is unrivalled. It is possible, that the learned commentator might have selected his example from Bro. Abr. tit. Action sur le Case, 72. without adverting to the omission of the consideration.

(3) The case of Wheatly v. Law, Cro. Jac. 667. (recognized by Holt C. J. in Coggs v. Bernard, Lord Raym. 920.) in which it was adjudged, that the acceptance of a sum of money by the defendant from the plaintiff, for the purpose of paying it over to a creditor of the plaintiff, was a sufficient consideration to support a promise by the defendant to perform the trust, may appear an exception to this rule. The exception, however, is only apparent; for, from the report of the same case in Palm. 281, under the name of Loe's case, it is evident, that the Chief Justice considered the detention of the money as a damage to the plaintiff. Whether the application of the rule was just in that case, is another question. It is clear, however, that the rule itself was recognized by the court.

tend that the defendant had made any private gain to himself, but that he had disposed of the goods for the benefit of the children, according to the trust reposed in him.

The mere performance of an act, which the party was by law bound to perform, is not a sufficient consideration. Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been holden to be void; because a seaman is bound to exert himself to the utmost in the service of the ship^a.

So where, in the course of a voyage, some of the seamen deserted, and the captain, not being able to find others to supply their place, promised to divide the wages, which would have become due to them, among the remainder of the crew, it was holden^a, that this promise was void for want of a consideration; for the desertion of a part of the crew was to be considered as an emergency of the voyage as much as their death, and the remainder of the crew were bound, by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port.

Natural affection, although sufficient to raise an use, is not a sufficient consideration, whereon an assumpsit may be founded^b (4).

Where A. is indebted to B. in one sum, and B. is indebted to C. in a less sum, if B. promises A. to discharge him of so much of his debt, as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B^c.

^a Harris v. Watson, Peake, N. P. C. 72. Lord Kenyon, C. J. ^b Agreed by the court, in Burt v. J. S. and wife, Cro. Eliz. 756.
^c Stilk v. Myrick, 2 Camp. N. P. C. 317. p. Gouldsbrough, 49.

(4) A release of an equity of redemption is a good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery. Thorpe v. Thorpe, Lord Raym. 603. But see Preston v. Christmas, 2 Wils. 87, where it was holden that the release of an equity of redemption was not of any value in contemplation of law. In Wells v. Wells, 1 Lev. 273. a release of an equitable interest was held a good consideration.

How far a moral obligation is a sufficient consideration, and what must be understood by that term, see an elaborate note by the learned reporters of the cases adjudged in the Court of Common Pleas, in Wennall v. Adney, 3. Bos. and Pol. 249, and post p. 56, n. (11).

The defendant being indebted to the testator in a sum of money upon simple contract, the plaintiff, his executor, agreed to take a less sum, payable by instalments, in lieu of the original debt; in consideration whereof, the defendant promised the executor to pay him the lesser sum. On assumpsit brought, an exception was taken, in arrest of judgment, that the consideration was insufficient, because it did not appear that the plaintiff had discharged the defendant of the original debt. But the objection was over-ruled, because the original debt being due to the plaintiff, as executor, the action to recover that must have been in the detinet; but by the agreement on the part of the plaintiff to take a less sum, and the promise by the defendant to pay that sum, it became the proper debt of the plaintiff, and the action for it maintainable in his own name, without being named executor. And (by Yelverton Justice) although the less sum is not any satisfaction of the greater, because they are both of one nature, yet in respect that the nature of the action was changed, it was therefore a good consideration.

In order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto: it was holder, that as the agreement was such as the plaintiff would not have made, unless the defendant had acceded, there was a sufficient consideration for the defendant's promise.

Forbearance of Suit—in what Cases a sufficient Consideration.—If a creditor, at the request of his debtor, forbear to sue him for a certain time, that is a sufficient consideration for a new promise by the debtor, for the non-performance of which an action of assumpsit may be maintained. So if a creditor at the request of J. S. forbear to sue his debtor for a certain time, that is a sufficient consideration to support a promise by J. S. to pay the debt. But by Stat. of Frauds, 29 Car. 2. c. 3. s. 4. this agreement must be in writing.

Forbearance to sue an executor (having assets) for a certain time upon a simple contract debt of his testator, is a good consideration to found a promise by the executor to pay the debt. So forbearance to sue an executor for a reasonable time for the debt of his testator, although the exe-

q Goring v. Goring, Yelv. 10, 11.

r Bailey v. Croft, 4 Tantt. 611.

* 1 Roll. Abr. 27 pl. 49.

t King v. Wilson, per Raym. C. J.

50. 87.

u Fish v. Richardson, Cro. Jac. 27.

and Yelv. 55. Confirmed in Bond v.

Payne, Cro. Jac. 273.

cutor have not assets^x; but the agreement by the executor to pay the debt must be in writing^y, otherwise it will be void by Stat. of Frauds, 29 Car. 2. c. 3. s. 4.

That a forbearance to sue may be a good consideration, such forbearance must either be absolute^z, or for a definite portion of time^a, or a reasonable time^b; forbearance for a little^c, or some time^d, is not sufficient.

It must be observed, that in cases where an action is brought against a defendant, on a promise made, in consideration of forbearance of suit, an objection will not be allowed, after verdict, that the declaration does not state how the original debt accrued; for this is only inducement to the action^e. So if the declaration omit to state to whom the plaintiff forbore and gave day of payment, the omission will be cured by verdict^f.

But, upon special demurrer, it has been holden not sufficient to state a consideration to forbear generally, unless it be also shewn, that there was some person to be forborne.

Plaintiff declared, that B., since deceased, was at his death indebted to the plaintiff in a sum of money, for goods sold and delivered^g, whereof defendant Nancy had notice, and thereupon, after the death of B. defendant Nancy, before her marriage with other defendant A., in consideration of the premises, and also in consideration that plaintiff would forbear and give day of payment of said sum of money, as aftermentioned, defendant N. by note in writing, signed by her according to the statute, &c. on 20 March, 1801, promised plaintiff to discharge said debt in a reasonable time. That plaintiff had forborne from the time of the promise hitherto, yet defendant refused to pay: special demurrer, assigning for causes, that it was not alleged, from whom said sum of money was due at time of promise, or that any person was then liable to pay the plaintiff that sum, or to whom plaintiff had forborne, and given day of payment of said sum, and, in general, that declaration did not disclose any legal and sufficient consideration for the supposed promise, or any good cause of action. The court were of opinion, that the declaration was bad, observing, that "it is a known rule of

x *Johnson v. Whitcheott*, 1 Roll. Abr. 24. pl. 33.

y *Grindall v. Davies*, 1 Freem. 532.

z *Mapes v. Sidney*, Cro. Jac. 683.

a *Fish v. Richardson*, Cro. Jac. 47.

b *Johnson v. Whitcheott*, 1 Roll. Abr. 24. pl. 33.

c 1 Roll. Abr. 23. pl. 25.

d *Id.* pl. 26.

e *Austen v. Bewley*, Cro. Jac. 546.

f *Thorne v. Fuller*, Cro. Jac. 396.

g *Marshall v. Birkenshaw*, 1 Bos. & Pull. N. R. 172.

h *Jones v. Ashburnham and Nancy* ux. 4 East, 456.

law, that to sustain a promise, or to render it obligatory, there must be either a benefit to the party making the promise, or some loss or disadvantage to the party to whom such promise is made; otherwise it is considered as *nudum pactum*, and cannot be enforced. It is improperly termed a *forbearance to sue*, when it is not shewn that there was any person liable to be sued, from whom satisfaction might have been obtained, and in respect to whom plaintiff may have been said to have forbore suit, at the time when the promise was made. There might not have been any administrator, or if administration granted, any assets of the deceased; or the deceased might have been a bastard, and have had no legal representatives entitled to take out administration of his effects."

The consideration of forbearance is not confined to forbearance from suing by *action*; for forbearance to sue, though the party is liable in equity only^h, or desisting from a suit in chanceryⁱ, has been holden to be a good consideration. So desisting from further complaint before a justice of the peace^k; so forbearing to proceed upon a *capias utlagatum*^l; so staying the trial of a cause, after issue joined^m, is a good consideration for a promise to pay the costs incurred.

In what Cases Forbearance of Suit is not a Consideration.—Forbearance of suit against a defendant, where originally there was not any cause of action, is not a consideration to support an assumpsit:

A. and B. were bound jointly and severally in a bondⁿ to C. who released to A. Afterwards B., in consideration that C. would forbear to sue him for the payment of the money due on the bond, promised to pay it. On assumpsit brought, and a special verdict, the court were clearly of opinion, that, the debt having been entirely discharged by the release^o made by the obligee to A., there was not any consideration whereon an assumpsit might be grounded.

So where in assumpsit^p, it was stated, that there were controversies between the plaintiff and defendant, concerning the profits of certain lands, which the father of the defendant had taken in his life-time, and that the plaintiff had purchased a writ out of chancery to the intent to exhibit a bill

^h *Scott v. Stephens*, 1 Lev. 71.

ⁱ *Dowdenay v. Oland*, Cro. Eliz. 760.

See also *Coulton v. Carr*, Cro. Eliz. 847.

^k *Rippon v. Norton*, Cro. Eliz. 881.

^l *Jennings v. Harley*, Cro. Eliz. 909, and Yelv. 19.

^m *Dell v. Fereby*, Cro. Eliz. 866.

ⁿ *Hammou v. Roll*, March, 202.

^o 1 Inst. 232. m

^p *Tooley v. Windham*, Cro. Eliz. 206.

against the defendant for the said profits, the defendant, in consideration that the plaintiff would surcease his suit, promised the plaintiff that if he could prove, that the father of the defendant had taken the profits, or had the possession of the lands, under the title of the father of the plaintiff, he, defendant, would pay the plaintiff for the said profits. After verdict for the plaintiff upon non-assumpsit, the court were of opinion, that there was not any good consideration; for it was not alleged that the defendant was heir or executor, and even if it had been so alleged, yet there was not any cause to charge him for a personal tort. Judgment for defendant.

So, where the declaration stated, that the father of the defendant became bound to the plaintiff by bond⁴, with a penalty, conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defendant, in consideration that the plaintiff would forbear his intended suit against the defendant, promised to pay the debt. After non-assumpsit pleaded, and verdict for the plaintiff, a motion was made in arrest of judgment, on the ground, that there was not any consideration; for it did not appear, that the defendant's ancestor had bound himself *and his heirs*, and if the heir was not bound expressly by name, he was not bound at all. Judgment arrested (5).

So, where testator was indebted to the plaintiff for money lent⁵, and for velvet and other merchandises sold and delivered, and promised to pay the plaintiff on a certain day, and died before the day; the plaintiff intending to sue the defendant, his executor, he, in consideration of forbearance for a certain time, promised to pay the debt. The defendant pleaded, that, at the time of the delivery of the goods, the testator was an infant. On demurrer, it was adjudged, that an action would not lie; for the contract of the infant was

⁴ Barber v. Fox, 2 Saund. 106.

⁵ Stone v. Wythpoll, executor, Cro. Eliz. 186.

(5) See also Hunt v. Swain, 1 Lev. 165. to the same effect. See also Crosskey v. Honor, 1 Vern. 180. where a bill was brought by the obligee *intra bond* against the heir of the obligor, alleging that he having assets by descent ought to satisfy the bond; the defendant demurred, because the plaintiff had not expressly alleged, that the *heir was bound in the bond*; and the demurrer was allowed.

merely void, and if debt had been brought against him he might have pleaded *nil debet*.

So, where a *feme covert*^a, carrying on business as a feme sole trader in the city of London, purchased of the plaintiff articles in the way of her trade, and, after her death, her husband promised to pay for them; it was holden to be a void promise, for want of a consideration, the husband not being liable (6).

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husband-like manner^b.

Consideration must move from Plaintiff.—Having endeavoured to explain the nature of the consideration, as far as respects the sufficiency of it, it will be proper in the next place to observe, that the consideration on which the promise of the defendant is founded, must move from the plaintiff.

Therefore where the plaintiff declared^c, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant, in consideration that A. would permit the defendant to sue B. in A.'s name, for the recovery of the sum due from B. to A., promised, that he, the defendant, would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered; after verdict for the plaintiff, upon non-assumpsit, it was moved in arrest of judgment, that the plaintiff could not maintain this action; and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done

^a Fabian v. Plant, 1 Show. 153.

^b Bourne v. Mason, 1 Vent. 6.

^c Powley v. Walker, 5 T. R. 373.

(6) In *Loyd v. Lee*, 1 Str. 94. a married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it. It was insisted, that though the note was voidable by reason of the coverture, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But Pratt, C. J. held, that the note was absolutely void; and forbearance, where originally there was not any cause of action, was not a consideration to support an assumpsit. He added, that it might be otherwise where the contract was only voidable.

nothing of trouble to himself, or of benefit to the defendant.

So where the plaintiff declared¹, that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant should pay to the plaintiff the debt due to him from J. S. and that J. S. should make the defendant a title to a house, in consideration whereof the defendant promised to pay the plaintiff the debt due to him from J. S. and then averred that J. S. was always ready to perform his part of the agreement: on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration.

The plaintiff declared, that his wife's father being seized of lands now descended to the defendant², and being about to cut down 1000l. worth of timber to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, the defendant would pay the daughter 1000l.: after verdict for the plaintiff, upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors; for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her; but Scroggs, C. J. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means.

Another Requisite of the Consideration.—It must be observed, in the next place, that the consideration must be such, as the party undertaking has a power by law to perform, or cause to be performed.

The plaintiff declared, that he being bailiff to J. S.³, the defendant, in consideration that the plaintiff would discharge defendant of a debt due to J. S. promised, &c. After verdict and judgment for the plaintiff in the court below, it was reversed in B. R., because the plaintiff could not discharge a debt due to his master.

The principle established by the preceding case was re-

¹ *Crow v. Rogers*, Str. 592.

² *Dutton and Wife v. Pool*, B. R. M.

29 Car. 2. 2 Lev. 210. 1 Vent. 318.

334. affirmed on error in the Exche-

quer Ch. Trin. 31 Car. 2. T. Raym.

302. cited in *Martyn v. Hind*, E. T.

1776, Cowp. 439. 443.

³ *Harvey v. Gibbons*, 2 Lev. 159.

cognized by Lord Kenyon, C.*J. in the case of *Nerot v. Wallace*, 3 T. R. 22. where the consideration was, that the plaintiffs, who were assignees under a commission of bankrupt against J. S., would forbear to proceed to have the examination of J. S. taken before the commissioners, concerning certain sums with which J. S. was charged, and that the commissioners would forbear and desist accordingly. Lord Kenyon said, "the ground on which I found my judgment is this, that every person, who in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go, and that not only in fact, but in law. Now as to the promise made by the assignees in this case, which was the consideration of the defendant's promise, it was not in their power to perform it, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for their own acts, but also, that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement (7). And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it."

Consideration past or executed.—It remains only to add, that a consideration, past or executed, will not support a subsequent promise, unless the act was done at the request, either express or implied, of the party promising* (8).

* 1 Roll. Abr. 11 pl. 1.

(7) It must not be inferred from the language of Lord Kenyon in this case, that a party may not stipulate for the act or forbearance of a stranger, and that such stipulation will not in any case form a good and sufficient consideration; if the act be such, as the stranger might do or abstain from doing legally, or without any breach of duty, an objection cannot be raised against such a consideration.

(8) See a note on this subject by Serjeant Williams, in *Osborne v. Rogers*, 1 Saund. 262. n. (1.) See also *Mob. 106. Lampleigh v. Brathwait*, where it was agreed, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party promising, it will bind.

ASSUMPSIT.

As if the servant of A. be arrested for a trespass^b, and J. S., without the request of A., bails the servant, and afterwards A. promises J. S. to indemnify him, the promise is void; because the bailing, which was the consideration, was past and executed before.

But where the act, which forms the consideration, is done at the request of the party promising, the circumstance of the promise being subsequent in point of time to the consideration will not affect it. As if A. requests B. to endeavour to procure a pardon for A.^c, and after B. has made such endeavour, A. in consideration thereof promises to pay him a certain sum of money, this is a good consideration.

The distinction established by these cases shews the necessity of stating in declarations on executed considerations, that they were done at the request of the party promising; for although, after verdict, the court will in some cases imply a request, yet after a judgment by default, the omission has been holden fatal; as, where the declaration was for work and labour done by the plaintiff for the defendant^d, and averred, that the plaintiff therefore deserved of the defendant so much, in consideration whereof he afterwards promised to pay. After judgment by default, and final judgment in C. B. for the plaintiff, it was objected on error in B. R., that this was a past consideration, and not being laid to be done at the request of the defendant, it could not be a consideration to raise an assumpsit. The court were of this opinion, and reversed the judgment in C. B., observing, that it did not appear, that the work was for the benefit of the defendant, and they must take it to be a past consideration, being laid that afterwards he promised to pay. They added, that, if this had been after verdict, an inference in support of the judgment might have been drawn from the words for the defendant, and of the defendant (9), but the statutes of jeofails did not protect judgments by default against objections that were cured by a verdict at common law, but such as were remedied after a verdict by the statutes (10).

^b Dyer, 279.

^d Hayes v. Warren, 442. 931.

^c 1 Roll. Abr. 11. (Q) pl. 6.

(9) Because the defendant having derived a benefit, and afterwards agreed to pay for it, the court would have implied that the consideration was executed at his request.

(10) Sir J. Barrow says, that, according to his note of Hayes v. Warren, the court reversed the judgment of C. B. because it did

A moral obligation is a good consideration for a promise to pay. Hence where a feme covert, having an estate settled to her separate use, gave a bond for repayment, by her executors, of money advanced at her request, on security of that bond, to her son-in-law. After her husband's decease, she wrote, promising that her executors should settle the bond. It was holden that assumpsit would lay against the executors on this promise of the testatrix¹.

If a person is under a moral obligation to do an act, and another person does it without his request, a subsequent promise to pay will be binding². Therefore, where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden good, for they were under a moral obligation to provide for the poor (11).

¹ Lee v. Muggerridge and another, ² Watson v. Turner, Bull. N. P. 129. 5 Taunt. 36. 147. 281.

not appear, that the consideration was for the benefit, or at the request, of the defendant. See Pillans v. Mierop, 3 Burr. 1671. where Wilmut J. is reported to have said, that the case of Hayes v. Warren was a strange and absurd case.

(11) I cannot forbear transcribing a part of the ingenious remarks, before alluded to, on this and the following case:—"The case of Watson v. Turner, Bull. N. P. 147. has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord Mansfield, (viz. that a moral obligation is a sufficient consideration for an express promise,) because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed, that this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor, which obligation being a legal obligation, distinguishes the case. Indeed, in Atkins v. Banwell, 2 East, 505, that distinction does not seem to have been sufficiently adverted to, for Watson v. Turner was cited to shew that a mere moral obligation is sufficient to raise an *implied* assumpsit; and though the court denied that proposition, yet Lord Ellenborough observed, that the promise given in the case of Watson v. Turner, made all the difference between the two cases, without alluding to another distinction which might have been taken, viz. that though the parish officers were bound by law in Watson v. Turner, the defendants in Atkins v. Banwell, were not so bound, because the pauper had been relieved by the plaintiffs, as overseers of another parish, though belonging to the parish of which the defendants were overseers." 3 Bos. & Pul. 250, 251. It appears

But, although a moral obligation is a good consideration for an express promise, it has never been carried further, so as to raise an implied promise in law. Hence where the parish officers of A. laid out money in providing medical assistance and other necessities for a pauper^g, who was taken suddenly ill in the parish, and could not be removed in consequence of his illness, it was holden, that the law would not raise an implied promise in the parish of B., in which the pauper was legally settled, to reimburse the money laid out by the parish of A., although the parish of B. had notice of the pauper's illness.

An accident happened to a driver of a waggon, belonging to I. S., in the parish of A., the man was immediately removed to the nearest public-house, which was in the parish of B., where the plaintiff attended him as a surgeon; the parish officer of B. visited the place, and did not discharge the plaintiff; it was holden that he was liable to pay the plaintiff for his attendance; the removal being *bonâ fide*^h.

A master is not liable upon an implied assumpsit to pay for medical attendance on a servantⁱ, who has met with an accident in his service.

In cases where, though a debt or duty remains uncanceled, yet the liability of the party to be sued is *suspended*, either by the intervention of a rule of law, or the provisions of a statute, a subsequent express promise will remove the suspension and restore the liability so as to give a right of action; for it is in the power of any party to wave an advantage which the law gives him (12).

g *Atkins v. Banwell*, 2 East, 505.
h *Lamb v. Buncie*, B. R. Trm. 55 G. 3.

i *Wrennall v. Ainsley*, 3 Bos. & Pul. 247.

4 M. and S.

that the case of *Watson v. Turner*, may be supported on strict legal principles, without resorting to the doctrine of moral obligation, of which not a trace can be found in the older cases. The defendants, being bound by law to provide for the poor of their parish, derived a benefit from the act of the plaintiff who afforded that assistance to the pauper, which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance, was evidence from which it might be inferred that the consideration was performed by the plaintiff, with the consent of the defendants, and consequently sufficient to support a general *indebitatus assumpsit* for work and labour performed by the plaintiff, for the defendants, at their special instance and request.

(12) This rule, expressed in the language of Lord Mansfield, is

Hence, where the holder of a bill of exchange^k had failed in giving due notice of the dishonour of the bill to the drawer, it was adjudged, that a subsequent promise by the drawer, that he would see the bill paid, would support an assumpsit.

In like manner it has been holden, that a promise to pay a debt barred by the statute of limitations^l, a positive and precise promise^m by a bankrupt after his certificate to pay an antecedent debtⁿ; and a promise by a person of full age to pay a debt contracted during his infancy, are binding^o. But a promise made, after taking benefit of an insolvent act, to pay an old debt by instalments, without specifying the amount or time of payment, will not raise a new assumpsit to pay the debt^p. (13).

Motion to set aside an execution against the goods on a note^q given by a debtor discharged under the insolvent act of 21 G. 3. c. 63. for 120l. (100l. of which he had been discharged from by the act, but in consideration of the loan of 20l. more, he had given a note for the whole) and to restore the goods taken under the *feri facias*: Lord Mansfield, C. J. after the case had been considered, said, that there was a difference between the case, where the debt was destroyed, and where it remains, but the remedy only taken away by the statute: in cases on the statute of limitations, there is not required any consideration for reviving the promise: nor is there in this case, except the conscientious obligation, which is a good consideration. There is not any difference between cases of insolvency and bankruptcy. Buller J. mentioned a

^k *Hopes v. Alder*, 6 East, 16. n. Rogers v. Stevens, 2 T. R. 713.

^l *Lundie v. Robertson*, 7 East, 231.

^m *Haddock v. Bury*, Middx. Sittings, T. 5 G. 2. per Raymond, C. J. S. P.

ⁿ *Hyleing v. Hastings*, Lord Raym. 899.

^o See *Lyubay v. Weightman*, 2 Esp. N. P. C. 198.

^p *Trueman v. Feston*, Comp. 544.

^q *Southerton v. Whitlock*, 1 Str. 690. Per Raymond C. J.

^r *Macklow v. St. George*, 4 Taunt. 613.

^s *Best v. Barber*, 3 R. M. 23 G. 3. MSS. Doug. 101. n. See Wilson

^t *Kepp*, 3 R. M. 55 G. 3. that party cannot be arrested on fresh promise.

the same as the former, viz. that a moral obligation is a good consideration for an express promise.

(13) In cases of this kind some eminent pleaders not only declare for the original cause of action, but they also insert in the declaration a count on the subsequent promise, the consideration for which they state to be the debt remaining unpaid.

case of this nature before Lord Hardwicke, chancellor, 1 Atk. 255. (14). Rule discharged.

A subsequent promise will not operate so as to revive a void security^r.

If the subsequent promise be conditional^s, it is incumbent on the plaintiff to shew the condition performed: as if a bankrupt after obtaining his certificate, promise to pay a prior debt when he is able, the plaintiff must prove the ability of the defendant to pay at the time of the action brought on the subsequent promise.

The Agreement must be legal.—Having, in the preceding pages, attempted to explain the nature of the consideration, I shall proceed to the examination of another general principle relative to the agreement, namely, that in order to maintain an assumpsit, the agreement must be legal; that is,

1st. It must not contravene any rule of the common law, the express provisions of any statute^t, or the general policy of the law.

It has been observed that the two essential parts in every parol agreement, are the consideration and the promise. If either of these be illegal, or if part of the entire consideration be illegal^u, or if the promise be to do two or more acts, one of which is illegal^x, an action cannot be maintained for a breach of the agreement.

Hence where the consideration was, that the plaintiff would

^r Cockshott v. Bennett, 2 T. R. 761.

^s Besford v. Saunders, 2 H. Bl. 116.

per Gould and Heath Js. dissent.

Lord Loughborough, C. J.

^t Featherstone and Hutchins, 3 Leon.

228.

^u Cro. Jac. 101.

^x T. Jones, 24

(14) A. formerly a trader in Holland, failed there, upon which there was a *cessio bonorum*. He came to England, and having procured an appointment as governor of a settlement abroad, belonging to the African Company, applied to the petitioner to be his security to the company, and advance him a sum of money, who agreed to it, provided A. would give him a bond comprising the remainder of an old debt due before the *cessio bonorum*, as well as the further sum advanced, which was done accordingly. A. becomes a bankrupt, and the commissioners doubting whether the petitioner ought to be admitted a creditor for the whole money, he made an application to the chancellor for that purpose: Lord Hardwicke, chancellor, was of opinion, that he was entitled to be admitted a creditor for the whole money upon his bond. *Ex parte Burton*, 1 Atk. 255.

procure the defendant to be presented and instituted to a chapel, which was a donative in the king's gift, it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an assumpsit. So where defendant, an under-sheriff, having seized the goods of J. S. under an elegit, sued out by the plaintiff, in consideration that the plaintiff, at the request of the defendant, would sue out another writ of elegit, and authorise some person to receive the goods, promised to procure the goods to be found by an inquisition, and to deliver them to the person authorised; the court were of opinion that the promise was illegal: 1. Because the seizing the goods under the first elegit was ill, for want of an inquisition, and it differed from a *fi. fa.* so that the defendant was a trespasser *ab initio*, and this promise was to make good his own wrong: 2. It was the duty of the sheriff to return the jury, who ought to be impartial; but this promise bound him contrary to the duty of his office; and although one part of the promise was legal, yet that depending on the illegal part vitiated the whole.

So where a person promised to indemnify a gaoler, if he would permit a prisoner to escape out of execution; it was adjudged, that an action could not be maintained for a breach of the promise; because the consideration, namely, the suffering a prisoner in execution to escape, was against law.

By stat. 24 G. 2. c. 40. (passed for the purpose of restraining the retailing of distilled spirituous liquors, and thereby to check the immoderate drinking of those liquors by the lower class of the community) s. 12. it is enacted "that no person shall maintain any action for any debt or demand, for any spirituous liquors, unless such debt has been *bond fide* contracted at one time, to the amount of 20s. or upwards; nor shall any item in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least, without fraud; and where no part of the liquors sold or delivered shall have been returned or agreed to be returned directly or indirectly."

In an action for use and occupation of part of a house, and for goods sold and delivered, it appeared that the plaintiff was a liquor-merchant, and the defendant took one side of a house belonging to him, the other side being

y Mackaller v. Todderick, Cro. Car. 337. 353. 361.

a Morris v. Chapman, T. Jones, 34. Carter, 223. S. C.

a Martin v. Blithman, Yelv. 197. See

also Sherley v. Packer, 1 Roll. R. 313. to the same effect.

b Jackson v. Attrill, Peake's N. P. C. 180.

occupied by one Eaton, who sold liquors on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there were had from Eaton as they were wanted. Many of the items in the bill for liquors were under 20s. It was objected, that the plaintiff could not recover for those items; but Lord Kenyon thought this case did not fall within the mischiefs intended to be remedied by this statute, the intent of which was to prohibit the sale of such small quantities to the consumer. This was done for the purpose of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of society. In the present case the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore not within the statute.

In assumpsit for goods sold and delivered, it appeared that the defendant had run up a score for grog, beer, and herrings, consumed by him at a public-house kept by the plaintiff. It was objected, that the demand for the grog could not be sustained, being illegal within the preceding statute. Thomson B. was of this opinion, observing, however, that the statute was confined to spirituous liquors. The plaintiff recovered for the residue of his demand^a.

An action was brought to recover the price of a quantity of bricks sold by the plaintiff, a brick-maker^b, to the defendant. It appeared that the bricks had been selected by the defendant, but upon being measured they were found to be of less dimensions than the stat. 17 G. 3. c. 42, requires. It was holden, that the plaintiff could not recover; the policy of the statute being to protect the purchaser of this article against the fraud of the seller. N. It did not appear, that the defendant bought the bricks knowing them to be under size.

A promise not to use a trade in a particular place is legal^c. So a contract entered into by a practising attorney^d, that he would relinquish and make over to B. and G. two other attorneys, his business as an attorney, as far as respected his practice in the profession within London, and 150

^a *Gilpin v. Rendle*, Devonshire Lent Ass. 1809. MS. See *Spencer v. Smith*, 3 Camp. N. P. C. 9. that this stat. does not extend to a security, e. g. a bill of exchange given in payment of small quantities of spirituous

liquors. Per Lord Ellenborough, C. J. But see *Scott v. Gilmour*, 3 Taunt. 225 and post.

^b *Law v. Hudson*, 17 East, 909.
^c *Broad v. Jollyfe*, Cro. Jac. 296.
^d *Burns v. Guy*, 4 East's R. 90.

miles from thence; and all his business as agent for any attorney, and that he would recommend his clients and permit B. and C. to use his name in the business, has been holden valid.

Of Agreements contrary to public Policy.—The defendant, in consideration that the plaintiff, who was master-joiner in one of his Majesty's dock-yards, would procure himself to be superannuated, undertook, in case he, defendant, should succeed the plaintiff as master-joiner, to allow him the extra pay from the yard-books*. This agreement, having been made without the knowledge of the navy board, to whom the appointment belonged, was holden void, on the ground that it was contrary to public policy. So where A. through the interest of B. was appointed to the office of customier of Carlisle^h, having previously signed an agreement that his name was made use of *in trust for B.*, and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use; this agreement was holden void, first, as being against the principles of the common law, inasmuch as the public was abused and the king deceived: and secondly, because the agreement was in violation of the statutes, (12 R. 2. c. 2. and 5 & 6 Edw. 6. c. 16.) (15) which were made to guard against evils of this nature. On the same ground it was holden, that upon an agreement for the sale (by the owner) of the command of a ship in the service of the East India Companyⁱ, made without the knowledge and against the bye laws of the company, an action could not be maintained.

A promise was made by the defendant^k, a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt, concerning certain sums of money with which he was charged, that he, defendant, would

g *Parsons v. Thompson*, 1 H. Bl. 399.

3 T. R. 19. See *Stackpole v. Earle*,

h *Garforth v. Fearon*, 1 H. Bl. 397.

2 Wils. 133. S. P.

i *Blachford and another v. Preston*,

k *Neret v. Wallace*, 3 T. R. 17.

(15) This statute of Edw. 6. prohibits the sale of certain offices, which are specified in the second section. With respect to offices under government not mentioned in this statute, it has been decided, that they cannot be sold. But there are some offices which may be the object of sale, if the sale takes place under the authority and with the consent of those who have the power of appointment, as commissions in the army, &c. Per Kenyon C. J. and Lawrence J. 3 T. R. 92. 94.

pay those sums; the consideration was holden void being contrary to the policy of the bankrupt laws.

An agreement by the payee of a bill of exchange to discharge a person liable upon it¹, in consideration that the latter would not move the court of Kings Bench against him (the payee), for a misdemeanor, is illegal.

A number of bleachers^a, in the county of Lancaster, finding that losses to a considerable amount had been incurred by them from their not being entitled to retain goods put into their hands for a general balance, came to an agreement that they would not receive the goods of any person, who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement came to the knowledge of J. S. who afterwards sent a quantity of goods to A. one of these bleachers, for the purpose of being bleached. J. S. became a bankrupt. The assignees demanded the goods, but the bleacher insisted that he had a lien on the goods for what remained due to him for his work and labour upon other works delivered to the bankrupt before the bankruptcy. It was contended on the part of the assignees, that the object of the agreement was to create a lien in cases where none existed before; and though an individual might impose such terms on his customers, yet it was not competent to a class of men to do it; and that it was against public policy to permit combinations of this sort to avail. But the court were of opinion, that as the convenience of commerce and natural justice were on the side of liens, this agreement was legal, its object being merely to enforce that which the law considered as equitable; more especially as it was made by persons who had an option either to work for this or that person as they chose.

2dly. The agreement must not be contaminated with, or arise out of, an illegal transaction.

Hence, where an agreement was made between two parties^b, subjects of this country, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England; it was holden, that the vendor could not maintain an action for the value of the goods. And in a subsequent case, it was decided^c, that the circumstance of the

¹ *Pool v. Bonefield*, 1 Camp. N.P.C.55. ^a *Biggs v. Lawrence*, 3 T. R. 434.

^b *Kirkman v. Shawcross*, 6 T. R. 14. ^c *Clugau v. Pouloua*, 4 T. R. 467.

vendor being an inhabitant of Guernsey would not vary the case, for he was still a subject of this country (16).

So where the vendor was concerned in giving assistance to the vendee to smuggle the goods^p, by packing them in the manner most suitable for, and with the intent to aid that purpose, although the vendor was a foreigner, resident abroad, and the sale and delivery of the goods were completed abroad, it was holden, that the vendor could not resort to the laws of this country to give effect to his agreement. But the mere knowledge of the vendor^q, that the goods were purchased for the purpose of being smuggled, is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery was completed abroad. So a person who sells goods knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price if he yields no other aid to the illegal transaction than selling the goods, and obtaining permits for their delivery to the agent of the purchaser^r. But where the plaintiff, a druggist, after the 42 G. 3. c. 38, but before the 51 G. 3. c. 87., sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*: it was holden^s, that he could not recover the price of them.

By the statute 6 G. 1. c. 18. s. 12. it is enacted, that all policies of insurance on ships, &c. at sea, or going to sea, made by any corporation (other than the two corporations therein mentioned) or by persons acting in partnership, shall be void.

A. and B.^t agreed to become partners as underwriters of policies for the assurance of ships at sea, in the profits as well as losses arising therefrom, but that the name of A. only should be used in the subscription of such policies. In pursuance of that agreement, policies were underwritten, and the premiums received by B. An action having been brought by A. to recover his moiety of the premiums, it was holden that it would not lie; for the plaintiff's claim

p *Waymell v. Read and another*, 5 T. R. 599. cited by Kenyon, C. J. Van-
dyck v. Hewitt, 1 East's R. 94.
q *Holman v. Johnson*, Cowp. 341.
r *Hodgson v. Temple*, 5 Taunt. 181.
s *Langton v. Hughes*, 1 Mau. & Sel.
593.
t *Booth v. Hodgson*, 6 T. R. 405.

(16) "A man may be born out of the realm, viz. of England, as in Ireland, Jersey, and Guernsey, &c. and yet as he is not born out of the ligeance of the king, he is not an alien." 1 Inst. 129. b.

arose out of a transaction which was illegal, and therefore the court would not give effect to it.

So where A. and B. were engaged in a partnership of the same description with that mentioned in the preceding case, and A. paid the whole of the losses; it was holden, that A. could not maintain an action against B. to recover a share of the money that had been so paid.

In like manner it has been holden, that in a case of this kind, the underwriters cannot maintain any action against the assured for the recovery of the premiums².

Where one of two partners had been compelled to pay the whole of a loss, and the other partner had paid his moiety of the loss into the hands of a broker; it was holden, that this moiety could not be recovered from the broker by the partner, who had paid the whole loss (17).

If an officer permit a prisoner to go at large³, in consequence of which he (the officer) is obliged to pay the creditor; the officer cannot maintain an action for money paid against the debtor; for he cannot raise a cause of action by the payment of money for another, on account of his own breach of duty (18).

Of fraudulent Agreements.—3dly. The agreement must

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| <p>a Mitchell v. Cockburne, 2 H. Bl. 179.
 Aubert v. Maze, 2 Bos. and Pul. 171.
 v. Branton v. Taddy, 1 Taunton's R. 6.
 v. Sullivan v. Greaves, Park's Ins. 8.
 Per Kenyon, C. J. who afterwards</p> | <p>stated this case to the judges of the King's Bench, who concurred in the same opinion.
 z Pitcher v. Lasky, 8 East, 171.</p> |
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(17) The defendant, being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board an Imperial ship, which insurance was illegal by 7 G. 1. stat. 1. c. 21. s. 2. The ship having been lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff. An action for money had and received having been brought, it was holden, that the defendant could *not* insist on the illegality of the contract as a defence, and the plaintiff recovered. Tenant v. Elliott, 1 Bos. and Pul. 3.

(18) But where an officer discharged a prisoner, arrested on *mesne process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the residue of the debt, it was holden, by Buller J. that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the *whole* debt, he was entitled to recover against the defendant for so much money paid to his use. Cordron v. Lord Macclesfield, Peake's N. P. C. 133.

be fair and honest, and not entered into for a fraudulent purpose; for fraudulent contracts are considered in the same light as illegal contracts, and consequently an action cannot be maintained for the breach of them.

The defendants^a being indebted to the plaintiffs and other creditors, and being insolvent, assigned all their effects in trust to pay 11s. in the pound to their creditors, to which all the creditors consented, and signed the deed of trust, except the plaintiffs, who refused to sign and to take any composition, unless^b the defendants would give them a note for the remaining 9s. in the pound; the defendants accordingly gave a note to that amount, whereupon the plaintiffs signed the deed. It appeared, that if the plaintiffs had not signed, the rest of the creditors would not have signed the deed. An action having been brought on the note, a verdict was found for the defendants; on an application made to the court for a new trial, it was refused; Lord Kenyon, C. J. observing, that the foundation of his opinion was, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendants' affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then the plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put into that situation, which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands.

The same principle was established in *Jackson v. Lomas*, 4 T. R. 166.

So where A. having given B. a sum of money for goods in advancement of C.^b, a secret agreement, between B. and C. that C. should pay B. a further sum for the goods, was holden to be void, on the ground that it was a fraud upon A.

So where a trust deed was proposed to the creditors of an insolvent^c, whereby they all engaged to accept payment of their debts by six instalments, the second, third, and fourth of which were to be guaranteed by collateral security, and

^a *Cockshott v. Bennett*, 2 T. R. 763. recognized by Lord Ellenborough in *Steinman v. Magnus*, 11 East, 394. See *Middleton v. Ld. Onslow*, 1 P. Wms. 768.

^b *Jackson v. Duchaire*, 3 T. R. 551.
^c *Leicester v. Rose*, 4 East's R. 372. recognized by Lord Eldon, C. in exp. *Sadler and anr.* L. I. H. Apr. 11-08.

the fifth and sixth were to remain on the single security of the insolvent; several of the creditors refused to sign, unless the plaintiffs did: in order to induce the plaintiffs to sign the deed, the defendant, at the instance of the insolvent, agreed that he (the defendant) would procure the plaintiffs a collateral security for the fifth and sixth instalments within a given time, whereupon the plaintiffs signed the trust deed, and the other creditors, who had before refused, signed also, but *without any knowledge* of the agreement between the plaintiffs and defendant: an action having been brought for the non-performance of this agreement, it was holden to be a void agreement, on the ground that it was a fraud against the other creditors; and although, in this case, the stipulation by the plaintiffs was for a further security, and not for more money, there was not any difference, in substance, whether a creditor stipulated for that, which he thought would produce him money more certainly, or for a larger sum than he had agreed to take in common with the other creditors; that it was equally a fraud upon the other creditors to stipulate for either.

Immoral Agreements.—4thly. If the agreement be of such a nature, that the carrying it into effect, and enforcing it, will give a sanction and encouragement to immorality, an action cannot be maintained for the violation of it. This position is founded on the maxim, *ex turpi causâ non oritur actio*, or in the elegant paraphrase of Lord Mansfield, justice must be drawn from pure fountains.

In an action for use and occupation of a lodging^d, where it appeared that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, it was holden, that the action was not maintainable^e. So where an action was brought against the defendant for board and lodging^f, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff who had kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord Kenyon, C. J. was of opinion, that such a demand could not be heard in a court of justice. On the same principle it was holden, that an assumpsit would not lie to recover the value of prints of an immoral or libellous tendency,

d Crisp v. Church, 11, C. B. E. 34 G. 3. f Howard v. Hodges, Middx. Sittings,
Per Eyre, C. J. B. R. before Lord Kenyon, Ch. J.
e Guarday v. Richardson, 1 Esp. N. 2 Dec. 1756.
P. C. 12. S. P. per Kenyon, C. J.

which had been sold and delivered by the plaintiff to the defendant^a. But in an action to recover the amount of a bill delivered for washing done by the wife of the plaintiff^b, where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentleman's night-caps, which were worn by the persons who slept with the defendant, with all which circumstances the plaintiff was acquainted; it was holden, that the use to which the defendant applied the linen could not affect the contract, and that the plaintiff was entitled to recover.

The same doctrine was laid down by Lord Ellenborough, in *Bowry v. Bennet*, 1 Camp. N. P. C. 348. where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff. The C.J. said, that the mere circumstance of the defendant being a prostitute within the knowledge of the plaintiff, would not render the contract illegal. In order to defeat the action, it must be shewn that the plaintiff expected to be paid out of the profits of the defendant's prostitution, and that he had sold her the clothes in order to carry it on.

II. Of the General *Indebitatus Assumpsit*.

HAVING premised that the rules laid down in the preceding section, govern the action of assumpsit in both its forms, that is, whether the plaintiff sets forth the agreement, for the breach of which he complains, specially, and declares, as it is technically termed, on a special assumpsit; or whether, the nature of his case permitting it, he adopts the general form of an *indebitatus assumpsit*, I shall proceed to an explanation of the latter form.

General Indebitatus Assumpsit.—The general *indebitatus assumpsit* is in the nature of an action of debt, and owes its introduction into general use to the circumstance of the defendant not being permitted in this form of action to wage his law (19). It may be considered as a general rule, that

g Per Lawrence J. Sittings Hil. 42 G. h *Lloyd v. Johnson*, 1 Bos. and Pul 340.
3 B. R. 4 Esp. N. P. C. 97.

(19) See *Slade's case*, 4 Co. 91—95 b. and the judicious remarks of Professor Wooddeson, in the third volume of his *Systematical View of the Laws of England*, p. 168. n. c.

an *indebitatus assumpsit* will not lie in any case, but where debt will lie¹ (20). It is observable, however, that the remedy by action of debt is more extensive than the remedy by *indebitatus assumpsit*; for debt may be brought on a record or specialty, whereas the *indebitatus assumpsit* is confined to parol agreements. Hence, although the form of the general *indebitatus assumpsit* is very concise, yet it is essentially necessary to state in the declaration *for what cause* the debt or duty became due, in order that it may appear to the court to be matter whereon an assumpsit may be founded; and an omission in this respect may be taken advantage of by writ of error², or in arrest of judgment, after verdict³. But it is not necessary in this form of action to state the particular items constituting the debt; it is sufficient if the declaration state generally, that the defendant was indebted to the plaintiff for work and labour⁴; for the agistment⁵ of cattle in the plaintiff's ground; for a premium⁶ upon a policy of assurance upon such a ship; upon an account stated⁷ (21); on a foreign judgment⁸, without stating the cause of action on which the judgment proceeded; or for money had and received⁹, without stating for what cause the money was had and received.

The counts in *indebitatus assumpsit* for work and labour, goods sold and delivered, money lent and advanced, money paid, laid out, and expended, money had and received, and on an account stated, being in most frequent use, are called the general or common counts, and all or some of them are usually added to every special assumpsit, where the circumstances of the case require it; the advantage of which is this, that if the plaintiff fails in proving the special count, he may resort to evidence applicable to the common counts¹⁰, unless the special contract remains open, still subsisting, and in force, in which case the plaintiff is precluded from recovering on the common counts¹¹.

¹ Hard's case, Salk. 23.

² Cro. Jac. 206, 207.

³ Foster v. Smith, Cro. Car. 31.

⁴ Hilbert v. Courthope, Carth. 276.

⁵ Gardner v. Bellingham, Hob. 3.

⁶ Fook v. Pinsacke, 2 Lev. 153.

⁷ Homes v. Savill, Cro. Car. 116.

⁸ Plaistow v. Van Uxem, Cam. Scacc.

T. 18 Geo. 3. Doug. 5. n.

⁹ Rabies v. Sikes, B. R. M. 22 Car. 2.

¹⁰ Payne v. Bacomh, Doug. 651.

¹¹ Hulle v. Heightman, 2 East's R. 147. recognising Weston v. Duquenois, Doug. 23. See also post, under *indebitatus assumpsit*, for money had and received, Art. 11. and Cooke v. Manstone, 1 Bos. and Pul. N. R. 351.

(20) The authority of this rule was questioned by Lord Mansfield, C. J. in *Moses v. Macferlan*, 2 Burr. 1008.

(21) In an action of *indebitatus assumpsit*, upon an account stated, it is not necessary to prove the items of the account, but

In addition to the causes of action already enumerated, it has been holden, that an *indebitatus assumpsit* will lie, for a fee due from any person who accepts the honour of knight-hood, to the gentlemen ushers and daily waiter to the king^a; for fees due to an usher of the black rod²; for a reasonable and customary fine due to the heir of the lord from a copyholder upon the death of the lord³; for freight⁴; for money due by the custom of London for scavage⁵; for tolls⁶; for a penalty due by the ordinances of a company for not serving the office of steward according to a bye-law⁷; and, lastly, *indebitatus assumpsit* will lie on a foreign judgment⁸.

But an *indebitatus assumpsit* will not lie upon a bill of exchange by the payee against the acceptor^c, because the acceptance is only a collateral engagement to pay the debt of another, namely, the debt of the drawer; nor will it lie for a wager^f, because a real consideration is wanting, and debt will not lie for a wager.

It will be proper to remark here that an *indebitatus assumpsit* will not lie on a special agreement² until the terms of it are performed, but when that is done, it raises a duty, for which a general *indebitatus assumpsit* will lie.

In cases of this kind, *i. e.* where the terms of the special agreement have been performed, if the plaintiff, having declared on the special agreement, and also on a general *inde-*

u Duppa v. Gerard, Carth. 95.

x Sanderson v. Brignall, Str. 747.

y Shuttleworth v. Garrett, Carth. 90.

Holt, C. J. dissentient. (22).

z 1 Vent. 100

a City of London v. Gorce, 2 Lev. 174.

b Steward v. Baker, 1 T. R. 618.

c Barber Surgeons v. Pelson, 2 Lev. 252.

d Crawford v. Whittall, Doug. 4 n. [1]

e Hard's Case, Salk. 23.

f Bovey v. Castleman, Ed. Raym. 69.

g Gordon v. Martin, Fitz. Gib. 303.

only that an account was stated, for that is the cause of action. Agreed per Raymond, C. J. Page and Reynolds, J. in Barth v. Emery, 1 T. R. 42. n. The accounting being the ground of the promise is traversable. Dalby v. Cooke, Cro. Jac. 234. On an account stated, the plaintiff is not obliged to prove the exact sum laid in the declaration. Thompson v. Spencer, B. R. E. 8 G. 3. Bull. N. P. 120. An acknowledgment by the defendant of a debt due upon any account, is sufficient to enable the plaintiff to recover upon a count for an account stated. Knowles v. Michel, 13 East, 249.

(22) It was admitted by the court, in this case, that debt would lie for a fine upon an admittance to a copyhold. See also Whitfield v. Huut, Doug. 727. n. [† 155.] where it was holden, that a general *indebitatus assumpsit* would lie by the lord against the tenant of a customary tenement for a fine due upon admission.

bitatus assumpsit, fail in proving the special agreement, he may resort to the general count¹ (23).

In an action of *indebitatus assumpsit* for goods sold and delivered¹, it appeared that the goods in question had been valued at a certain sum, for which payment was to be made by the defendant in three months after the 15th of September, 1802, (the day on which the bargain was concluded) by a bill of two months. The action was commenced in Hilary Term, 1803, before the expiration of five months from the day on which the contract was made. The Court of King's Bench (dissentiente Ellenborough, C. J.) were of opinion, that the action was prematurely brought on the implied assumpsit before the expiration of the credit, and that a special action of assumpsit was the mode in which the defendant ought to have been sued for the not giving at the end of three months a bill at two months, in which action the plaintiff would have been entitled to recover damages against the defendant for his not having given the bill, such as the loss of interest, &c. (24).

1 *Leeds v. Burrows*, 12 East, 1. 1 *Mussen v. Price*, 4 East's Rep. 147.

(23) "If A. declare upon a special agreement, and likewise upon a quantum meruit, and at the trial prove a special agreement, but different from that which is laid in the declaration, he cannot recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement; but if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover upon the quantum meruit; for otherwise he would not be able to recover at all." Bull. N. P. 139. Str. 638.

"I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right to do altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done. As in the case of a plaintiff suing a defendant as having built a house for him according to agreement; there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done." Per Sir J. Mansfield, delivering the opinion of the court in *Cooke v. Munstone*, 1 Bos. and Pul. N. R. 354. "If a man agrees to build for another a house to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed in futuro, or upon an *indebitatus assumpsit* or *quantum meruit*, when the house is actually built, and the agreement executed." Per Denison, *J. Alcorn v. Westbrook*, 1 Wils. 117.

(24) Care must be taken to distinguish cases of this kind from the common cases in which goods are sold, and a bill taken in payment payable at a future day, but without any express agreement

So where goods were purchased by the defendant of the plaintiff^k, to be paid for by a bill at two months, which bill was accordingly drawn upon the defendant for the amount of the goods, and tendered for acceptance, which was refused; an action of *indebitatus assumpsit* for goods sold and delivered having been brought before the expiration of the two months, it was holden by the Court of Common Pleas, on the authority of the preceding case, that the action could not be sustained (25).

But it must be observed, that the plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time^l, if it appear by a special memorandum that the bill was filed on a day subsequent to the expiration of the credit, although the writ appear to have issued before (26).

^k Dutton v. Solomonson, 3 Bos. & Pul 582.

^l Swancott v. Westgarth, 4 East's R. 75.

for time for the payment of the goods; in this last-mentioned case, if the bill is dishonoured, the drawer may be sued immediately upon the original cause of action without any regard being had to the time which the bill has to run; for there being no agreement as to time, the party takes the bill as payment, and, therefore, if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately. Stedman v. Gooch, 1 Esp. N. P. C. 5. Puckford v. Maxwell, 6 T. R. 52. Owenson v. Morse, 7 T. R. 64. A debtor is not discharged by giving a check which produces nothing, although payment in cash may have been previously tendered; and the circumstance of the check being given by the agent of the debtor, who is at the time indebted to his principal in a larger amount, makes no difference. Everett v. Collins, 2 Camp. N. P. C. 515.

(25) Lord Alvanley, C. J. said, "that he should recommend to any person bringing an action in a case of this kind, [even after the expiration of the two months] to declare on the special agreement, as well as on the general count; for he entertained great doubts, whether, even at the end of the two months, an *indebitatus assumpsit* would lie, if it did not lie before the expiration of that period." But see 4 East's R. 75. See also Brooke v. White, 1 Bos. & Pul. N. H. 330. cont.

(26) In like manner, where a declaration is entitled generally of the term, in which case it refers to the first day of the term, and evidence is given of a cause of action accruing after that day; yet, if upon the production of the writ it appears that the writ was sued out after the cause of action, no advantage can be taken of the mistake in the title of the declaration. Rhodes v. Gibbs, Surrey Sum. Ass. 1804, Heathy, J. 5 Esp. N. P. C. 165.

A. agreed to deliver to B. 100 bags of hops at a certain price per cwt. by a certain time". A. having delivered twelve bags before the stipulated time, and demanded payment, which was refused, immediately commenced an action for the price of the bags delivered. It was holden, that, as the contract was entire and could not be split, the plaintiff was not entitled to bring an action, until the whole quantity was delivered, or until the time for delivering the whole had arrived.

A collateral undertaking must be declared on specially; as where B. undertook in writing to A. to answer for the payment of certain goods to be sent by him to C., it was holden*, that A. could not maintain an *indebitatus assumpsit* against B. for the price of the goods sent to C.; but that he ought to have declared specially on the guaranty.

The general *indebitatus assumpsit* for money paid, and for money had and received, being those forms of action which are of more extensive application than any other known in the law, I shall proceed to inquire in what cases they may be brought, beginning with the *indebitatus assumpsit* for money paid.

Of the Indebitatus Assumpsit for Money paid.—Where a person has laid out his own money for the use of another, either with the express or implied consent of such other person, the law implies a promise of repayment, for a breach of which an *indebitatus assumpsit* for money paid, laid out, and expended, may be maintained:

As where one person is surety for another, and compellable to pay the whole debt*, and the surety is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay the debt by the desire of the principal (27).

m Waddington v. Oliver, 2 Bos. & Pul. N. R. 61. n Mines v. Sculthorpe, 2 Camp. N. P. C. 215. o Per Kenyon, C. J. 3 T. R. 310.

(27) Upon this subject, Buller, J. in *Toussaint v. Martinnant*, 2 T. R. 105. observed, that "in ancient times an action could not be maintained at law, where a surety had paid the debt of his principal; and the first case, in which the plaintiff succeeded, was before Gould, J. at Dorchester, which was decided on equitable grounds."

Although the preceding observation was cited without remark,

So where *two* persons are sureties for another¹, and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion towards the payment of the debt. N. In such case, it does not appear to be necessary, that the insolvency of the principal debtor should be proved.

But where it appeared that one of two sureties had been prevailed on to become a surety at the instance of the other², and the other had been compelled to pay the debt; Lord Kenyon would not permit him to call on his co-surety for contribution, more especially as he had taken a bill of sale from the principal debtor in order to protect himself.

This action may be maintained by the bail against their principal³, for the recovery of such sums of money, as they, from their situation as bail, and in order to secure themselves, have been fairly and necessarily obliged to expend. The bail may surrender their principal in their own discharge, and for their own security; consequently, if the principal absconds, and the bail incur expenses in sending after him and securing him, in order that he may be surrendered, such expenses may be recovered in this action against the principal.

p Admitted in *Cowell v. Edwards*, 2 q *Turner v. Davies*, 2 Esp. N. P. C.
Bos. & Pul. 208. and by *Ld. Ken-* 478.
yon, J. C. in the following case. r *Fisher v. Fellows*, 5 Esp. N. P. C.
171.

in a modern case, viz. by Mr. J. Lawrence, in *Cowley v. Dunlop*, 7 T. R. 568, I am inclined to think that the position is not strictly correct. From a MS. note in my possession, the same doctrine appears to have been laid down by Lord Mansfield, C. J. in the year 1757, six years before Sir H. Gould was appointed a judge of the Court of Common Pleas. The case alluded to was that of *Decker v. Pope*, London Sittings, 9th July, 1757. It was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving bond for the payment of the price of some goods that were sold to defendant; and the surety having been obliged to pay the money, the administrator declared against defendant for so much money paid to his use. Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.

So where A., B., and C. were lessees of certain premises by deed from D., to whom they covenanted to pay the rent and B. and C. assigned their interest to A., subsequent to which assignment, and with full knowledge whereof, the plaintiff put his goods on the premises, under the care of A., where they were taken as a distress by D. for rent arrear, and the plaintiff, in order to redeem his goods, was obliged to pay the rent due, taking at the time a receipt from D.'s attorney as for so much received on account of A., B., and C.; it was holden, that the plaintiff might maintain an action for money paid against A., B., and C., on the ground that the three defendants were liable to the landlord for the rent in the first instance, and as, by the payment made by the plaintiff, all the three were released from the demand of the rent, and as such payment was not a voluntary but a compulsory payment, because the plaintiff could not have relieved himself from the distress, under these circumstances the law would imply a promise by the three defendants to repay the plaintiff.

In the preceding case it will be observed that the money paid was the plaintiff's money; this is requisite for the maintenance of the action; for where A. let a house to B., which B. underlet to C., and A. distrained the goods of C. for rent due from B., which goods were afterwards sold by virtue of the stat. 2 W. & M. sess. 2. c. 5. s. 2, and the money arising from the sale paid over by the auctioneer to A.; it was holden that C. could not maintain an action against B. for money paid to his use, because the money in question never was the money of C. but the money of the landlord; for the moment the goods were converted into money, that money became an executed satisfaction in the landlord for the rent arrear; and C. the tenant was only interested in the surplus proceeds, if any, of the goods.

It is observable, that the mere circumstance of one person having received an advantage from the payment of money by another, is not sufficient to raise an assumpsit against the former; the consent of the party, either express or implied, is essentially necessary to the support of the action.

In an action for money paid, laid out, and expended, by the plaintiffs, to the use of the defendants, it appeared that

^a Exall v. Partridge and others, 9 T. R. 308.

^t Moore v. Pyrie, 11 East, 52.

^s Stokes and another, Overseers of St.

Veddel's, v. Lewis and another, Overseers of St. Michael le Quern, London, 1 T. R. 90.

by stat. 22 & 23 Car. 2. c. 11. the parishes of St. Vedast's and St. Michael le Quern were united; and that, since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that only nine vacancies in the office of sexton had happened since, all which had been filled up agreeably to this custom; that in the year 1759 the sexton's salary was fixed at 20l. per annum, which was agreed to be paid equally by both parishes; that the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum, to recover a moiety of which this action was brought. The defence set up was, that the last election of a sexton was not a joint one, and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish. Lord Mansfield, C. J. *This action must be grounded either on an express or implied consent; but here is neither.* Buller, J. If this were held to be a joint obligation, it would be saying, that the sexton might bring his action against one of the parishes for the whole sum, which is not the case.

In like manner it was holden, that a broker* (who had contracted with third persons for the sale of stock at a future day by the authority of his principal, but without disclosing the name of his principal, who afterwards in consequence of the rise of the stocks refused to make good his bargain) could not, by paying the difference to the persons to whom the stock had been sold, maintain an action for money paid on an implied assumpsit against his principal for the amount.

If an auctioneer is employed to sell an estate by auction†, and he undertakes to conduct the auction so as to avoid incurring the duty if the estate is not sold, but through mistake transacts the business so that the duty attaches, which he is obliged to pay, the law will not raise an implied promise on the part of the employer to reimburse the auctioneer the money paid for the duty, which has been thus incurred through his own blunder.

An officer guilty of a breach of duty cannot recover money which he has paid in consequence of it, though for the benefit of the defendant‡.

If A. recover in an action founded on *tort* against B. and C.§, and levy the whole damages on B., B. cannot maintain

z Child v. Morley, 3 T. R. 610.
y Copp v. Topham, 5 East, 393.

z Pitcher v. Bailey, 3 East, 171.
a Merryweather v. Niman, 3 T. R. 183.

an action against C. upon an implied assumpsit for a reimbursement of a moiety; for a contribution cannot be claimed as between joint wrong-doers (28).

A. having recovered a judgment against a trader^b, and taken out execution, a levy was made on the goods of the trader, but after he had committed an act of bankruptcy, and the money levied was paid over to A. An action of trover was afterwards brought by the assignees against A., the sheriff, and the bailiff, in which damages were recovered; and these damages, together with the costs, were paid by the bailiff: it was holden, that there was no implied promise on the part of A. to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might, in an action for money had and received, recover the levy-money, being money paid under a mistake to A. and the bailiff being answerable for it to the assignees.

In a case where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill^c, it was holden that the two could not maintain a joint action against the third for contribution, but that each ought to bring a separate action. So where three had entered into a joint and several bond of indemnity to a sheriff^d, for the protection of their separate interests, and the sheriff had compelled two of them to pay the whole sum, it was holden that they could not maintain a joint action against the third for contribution.

Of the Indebitatus Assumpsit for Money had and received.
The action for money had and received is founded on all

^b Wilson v. Milner, 2 Camp. N. P. C. 452. ^c Brand and another v. Boulcott, 3 Bos. & Pul 235.

^d Kelby v. Vernon, 5 Esp. N. P. C. 194.

(28) A different rule holds in the case of a joint judgment against several defendants in an action of assumpsit. Per Lord Kenyon C. J. S. C. So an action of assumpsit lies by a ship owner to recover from the owner of the cargo, his proportion of a general average loss incurred by sacrificing the tackle belonging to a ship on an extraordinary emergency for the benefit of the whole concern. Birkley v. Presgrave, 1 East's R. 220. So an action may be maintained to recover a contribution in the nature of general average by one shipper of goods against another, Dobson v. Wilson, 3 Camp. N. P. C. 480. The owners of a ship's cargo are liable to contribution, at the suit of the shipowners, for ship's stores necessarily thrown overboard after a vessel was captured and while she was in the hands of the enemy. Price v. Noble, 4 Taunt. 123.

the equitable circumstances of the case between the parties; and, consequently, in order to recover in this form of action, the plaintiff must shew that he has equity and conscience on his side. From the following positions it may be collected in what cases this action may be maintained.

1. If I pay money to a person who claims an authority to receive it, but really has not any such an authority^a, and afterwards I am compelled to pay it again to the person lawfully entitled to receive it, an action for money had and received will lie against the person unjustly receiving the money (29).

2. Where a person has usurped an office belonging to another^c, and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office against the intruder for the recovery of such fees.

Hence this action is frequently brought, in the place of an assize, to try the right to offices^d to which fees are annexed^e. It must be observed, however, that this action will not lie to recover gratuitous donations given to the intruder, as money given by strangers for shewing a church; for an assize will not lie for a gratuity.

An action for money had and received^f does not lie by the nominee of a perpetual curacy for the profits thereof, until he has obtained the bishop's licence; for, in curacies, the party is not in possession, until licence. But, in the case of a donative, the party is in full possession immediately on the nomination; and, consequently, if any other person takes the rents and profits, he may maintain an action for money had and received^g.

c *Bonnell v. Fouke*, 2 Sid. 4. See post, page 83, *Cripps v. Rende*.

f *Aris v. Stukeley*, 2 Mod. 260. See also *Howard v. Wood*, 2 Lev. 245. and the opinion of Holt, C. J. in 1 Ld. Ray. 703.

g *Boyer v. Dodsworth*, 6 T. R. 581.

h See *R. v. Bingham*, 2 East's R. 311. Information in nature of quo war-

ranto is the only convenient method of trying the right where there are no fees.

i *Powell v. Milbank*, M. 12 Geo. 3. B. 251 T. R. 399. n. 2 Bl. R. 851. S. C.

k Per Ashurst, J. in *The King v. Bishop of Chester*, 1 T. R. 403.

(29) If A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without B.'s authority, B. may, notwithstanding, recover the debt in an action against A., whose remedy is against the attorney, although the attorney was deceived by a counterfeited warrant of attorney. *Robson v. Eaton*, 1 T. R. 62.

3.—Where money, to which there was not any ground of claim in conscience, has been paid under a mistake, the party may recover it back again in an action for money had and received:

As where A,¹ who was indebted to the estate of B, a bankrupt, paid the debt to his assignees without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt, it was holden, that A. might recover the money, which he had neglected to set off, in an action for money had and received against the assignees. So where an action was brought against a person upon a groundless demand^m, and the cause was compromised by the payment of the money demanded, it was holden, that money had and received would lie for the recovery of the sum so paid. But where money has been paid under the compulsion of legal process in an action, which the party might have defended successfully if he had been prepared with his evidence, this money cannot be recovered, in an action for money had and received; although such evidence be produced at the trial of the second action as shews, that the other party was not entitled to recover it in the first.

The defendant had brought an action against the present plaintiff for goods soldⁿ, for which the plaintiff had before paid and obtained the defendant's receipt, but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought an action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Kenyon, C. J. was of opinion, that, after the money had been paid *under legal process*, it could not be recovered back again, however, unconscientiously retained by the defendant, though the case of *Moses v. Macferlan*, 2 Burr. 1009. (30) was referred to;

¹ *Bize v. Dickason*, 1 T. R. 285.
^m *Cobden v. Kenrick*, 4 T. R. 432. in
 notâ.

ⁿ *Marriott v. Hampton*, 7 T. R. 269

(30) *Macferlan* sued *Moses*, in the Court of Conscience, as indorser of a small bill of exchange, and recovered against him there, in breach of an agreement in writing between them, that *Moses* should not be liable nor prejudiced by reason of his indorsement. *Moses* paid the money and brought an action in the King's Bench to recover it back, as money had and received to

and thereupon the plaintiff was nonsuited. On a motion to set aside the nonsuit, Lord Kenyon said, that after recovery by process of law there must be an end of litigation, otherwise there would not be any security for any person. He could not consent therefore to grant a rule to shew cause, lest it should seem to imply a doubt. And Grose J. said; that it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their cause again, because they were not properly prepared the first time with their evidence. Rule refused (31).

Where a party pays money to another voluntarily, with full knowledge, or full means of knowledge, of all the facts of the case (32); the party so paying cannot recover it back again on account of his ignorance of the law.

As where an underwriter of a policy of insurance upon a ship having paid the amount of the insurance, as for a loss

o Bilbie v. Lumley, 9 East's R. 469.
recognised by Lawrence, J. in Lu-
thian v. Henderson, D. P. 3 Bos. &

Pol. 520. See also Gomery v. Bond,
1 M. & S. 378.

his use; and it was holden that the action might be maintained. See the judicious remarks of Eyre, C. J. on this case in Philips v. Hunter, 9 H. W. 414. and the pointed observation with which he concluded those remarks: "I believe that judgment (the judgment in Moses v. Macferlan) did not satisfy Westminster Hall "at the time: I never could subscribe to it; it seemed to me to "unsettle foundations." "Moses v. Macferlan has properly been "questioned in many cases; Per Heath, J. in Brisbane v. Dacres, 5 Taunt. 160.

(31) In Barbone v. Brent. in Chanc. Trin. T. 1683, 1 Vern. 176. a bill was filed for an account, stating, that the plaintiff had bought goods of the defendant, and had paid him money in part of satisfaction, but the plaintiff having lost the receipt, the defendant had recovered the whole value at law: demurrer, because it appeared of plaintiff's own shewing that the defendant had recovered at law. For the plaintiff it was insisted, that the case stated in the bill being by the demurrer admitted to be true, the plaintiff, as to the money overpaid, ought to be relieved in equity. Demurrer allowed; and per North, Ld. Keeper, if A. pays money in part of satisfaction, and afterwards the whole value of the goods is recovered against A. at law; the money so paid becomes money received to the use of the person who paid it, and he may recover it in an action at law.

(32) "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again." Per Ashhurst, J. in Chatfield v. Paxton, 4 East's R. 471. n.

by capture, sought to recover it, on the ground that the assured had not, at the time of effecting the insurance, disclosed to the underwriter a material letter respecting the time at which the ship sailed; but, it being proved, that, before the loss on the policy was adjusted, all the papers, including the letter in question, had been laid before the underwriter, it was holden, that he could not recover; for every man must be taken to be cognizant of the law (33).

The same doctrine was laid down in *Brisbane v. Dacres*, 5 Taunt. 143, with this limitation only, that the retaining the money be not against the conscience of the party to whom it is paid.

The same principle was recognized in the following case. The drawer of a bill of exchange, with full knowledge of time

(33) The defendant being tenant to the plaintiff of certain rooms at the yearly rent, of twenty guineas, the plaintiff, at the expiration of the year, insisted on being paid twenty-five guineas, and threatened to distrain if it was not paid. The defendant, in consequence of the threat, paid the larger sum, and an action having been brought by the plaintiff against the defendant for another demand, the defendant insisted on setting off the five guineas which he had paid under the threat of distress, as having been paid by compulsion, and in his own wrong. But Lord Kenyon, C. J. was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress. *Knibbs v. Hall*, 1 Esp. N. P. C. 84. cited by Lawrence, J. in *Lothian v. Henderson*, 3 Bos. and Pul. 520. So where a party, sued on a claim which he knows to be unfounded, pays it; although at the time of payment he protests against it, and declares his intention to bring an action to recover back the money so paid, yet no action will lie; for he ought to have defended the action brought against him. *Brown v. McKinnally*, 1 Esp. N. P. C. 279. *Lord Kenyon C. J.* See also *Cartwright v. Rowley*, 2 Esp. N. P. C. 743. It was agreed between A. and B., that A. for a certain commission should ship a cargo of wheat of a specific quality, at a foreign port, for B. in England. The wheat upon its arrival having been found to be of an inferior quality, B. brought an action against A. for a breach of the agreement, and recovered damages. A. afterwards brought an action against B. for the commission; but it was holden, that A. could not recover; Lord Ellenborough, C. J. observing, that the facts which he relied on in this action might have been given in evidence to reduce the damages when he was defendant; and that he considered the account as closed between the parties by the former verdict. *Kist v. Atkinson*, 2 Camp. N. P. C. 66.

having been given to the acceptor, upon a supposition that he (the drawer) remained liable, three months after the bill became due, promised the holder that he would pay the bill, if the acceptor did not; it was holden^p, that the drawer was bound by this promise, and could not avail himself of his ignorance of the law at the time when he made the promise.

Money due in point of honour or conscience, though a person is not compellable to pay it, yet, if paid, shall not be recovered^q.

4. Where money has been paid without consideration, or on a consideration which fails, an action for money had and received will lie for the recovery of it.

The plaintiff had insured several numbers in the lottery^r, at the office of the defendant, for which he had paid in premiums a considerable sum of money. The defendant having refused to pay the sums insured upon some of the chances which had terminated in favour of the plaintiff, he brought an action for money had and received against the defendant, in order to recover the premiums; it was holden that the action would well lie, although it was objected, that the contract was illegal by the Stat. 14 Geo. 3. c. 84^s, and the plaintiff *particeps criminis*; Blackstone J. observing, that, on the part of the insured, the contract on which he had paid his money was not criminal, but merely void, and therefore having advanced his money without any consideration, he was entitled to recover it back.

On the authority of the preceding case, the same point was ruled in *Jaques v. Withy*, 1 H. Bl. 65. See *Clarke v. Shee*, Cowp. 197. and post, under the sixth rule.

The deeds for securing an annuity were set aside for an informality in registering the memorial^t; it was holden, that money paid to the grantor, as the consideration of the annuity, might be recovered in an action for money had and received (34).

^p *Stevens v. Lynch*, 12 East, 39.

^q *Farmer v. Arundel*, 9 Bl. R. 824.

^r *Jaques v. Golightly*, 3 Bl. R. 1078.

^s See the remark of Ld. Ellenborough,

on this case, in *Thistlewood v. Cra-*
croft, 1 M. & S. 502.

^t *Shove v. Webb*, 1 T. R. 732. See
Stat. 17 Geo. 3. c. 36. annuity act.

(34) In this action the grantor may set off the payments made in respect of the annuity, and for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks*, 3 East's R. 16. But see the remarks of Mansfield, C. J. in *Burden v. Browning*, 1 Taunt. 522.

So where a deed, a bond, and warrant of attorney (upon which judgment had been entered^a) had been given for securing an annuity, and on the application of the grantor to the Court of King's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or bond, which remained uncanceled; it was holden, that the grantee might recover back the consideration in an action for money had and received, on the ground that he had contracted for one entire assurance, consisting of several securities, and that he had a right to have the assurance entire, or to have back his money, and the defendant having taken away one of the securities, the consideration for the money had failed.

It will be proper to remark here, that, in cases of this kind^b, the action for money had and received will not lie against a mere surety, who has not actually received any part of the consideration, although he has joined with the grantor in signing a receipt for it.

A lease was sold to the plaintiff by defendant as administrator^c, without any regular assignment, or other conveyance; but, at the time of sale, the defendant said, that the premises were his property, to do as he liked with, and if any thing happened, he would see the plaintiff righted. Afterwards, the defendant's letters of administration were repealed, and the plaintiff was turned out of possession by a recovery in ejectment at the suit of the new administrator; whereupon the plaintiff brought an action for money had and received, against the defendant, to recover the consideration paid for the lease; and it was holden, that it would well lie: Lord Kenyon, C. J. observing, that he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeach*^d, and in other cases, where a regular conveyance was made, to which other covenants ought not to be added: for in general the seller covenanted for his own acts, and for those of his ancestors only, in which respect the case of a mortgage differed from it, as a mortgagor covenanted, that at all events he has a good title; but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal administrator of the lessee though it turned out afterwards that he was not. As,

^a *Scurfield v. Cowland*, 6 East 18. ^y *Cripps v. Reade*, 8 T. R. 646.

^b 241.

^c *Doug. 551.*

^d *Strutton v. Rastall*, 2 T. R. 360.

therefore, *the money was paid under a mistake*, he thought that an action for money had and received would lie to recover it back; in the case cited (*Bree v. Holbeach*) no action at all could have been maintained (35).

But where a plaintiff has received benefit from a thing which he has purchased, e. g. a patent for an invention, although the patent should turn out to be void, the plaintiff cannot recover the consideration originally paid^a.

5. If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received.

The plaintiff having in the month of August pawned some goods with the defendant for 20l.^b, without making any agreement for interest, went in the October following to redeem them, when the defendant insisting on having 10l. as interest for the 20l. the plaintiff tendered^c him the 20l. and 4l. for interest, knowing the same to be more than the legal interest amounted to; the defendant still insisted on having 10l. as interest, whereupon the plaintiff, finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest, as money had and received to his use; the court held, that the action would

a *Taylor v. Hare*, 1 N. R. 260.
b, *Astley v. Reynolds*, Str. 915.

c See *Fitzroy v. Gwillim*, 1 T. R. 153.
as to the necessity of a tender of the money really advanced.

(35) So where defendant, who was in possession of the premises, of which he had been tenant under a lease from a tenant for life, then dead, sold the plaintiff the lease, pretending that it was a good lease for seven years, and shortly afterwards the plaintiff was ejected, it was holden by Lawrence, J. on the authority of *Cripps v. Reade*, that the plaintiff might recover the consideration paid for the lease in an action for money had and received. *Matthews v. Hollings*, Salop Summer Assizes, 1801. *Woodfall's Landlord and Tenant*, 2d edit. p. 35.

Where money is paid, and the thing contracted for not delivered, it is money had and received to the use of the party who has paid it. *Anon. per King*, C. J. Str. 407.

A. paid B. a sum of money for a bill of exchange on a banker, who broke before it could be tendered; it was holden, that A. might recover back the money in an action for money had and received. Bull. N. P. 131.

well lie, for it was a payment *by compulsion* (36), and the plaintiff might have had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will.

Case for money had and received by defendant for plaintiff's use^d:—On the trial it appeared that the plaintiff had purchased of one Sansom a copyhold estate in Patingham, which was defendant's manor. The estate was let at a gross rent of 60*l. per annum*^e; landlord paying land-tax, chief rent, &c. Plaintiff applied at the next manor court to be admitted, and tendered 120*l.* for the fine (two years' rent), saying, that no lord of a manor had a right to more than two years' value for a fine. Stevens (Lord Pigot's agent) refused to admit him, unless he paid 10*l. per cent.* on the purchase money (1650*l.*) 165*l.*; he said he durst not take the sum offered by plaintiff, nor would he suffer Mr. Jeffreys, the court-keeper, to admit plaintiff without payment of 165*l.* The plaintiff then paid the money demanded as a fine (165*l.*) in order to procure admission, but said it was too much money; and plaintiff afterwards applied to Lord Pigot himself, and to his agent in town, Mr. Partington, and offered to refer the matter of the fine to counsel. Lord Pigot said he would not return any part of the fine received, nor would he leave it to counsel. Defendant, at the trial, insisted that 10*l. per cent.* on the purchase money was the customary fine in that manor; and by estimating the estate which was 100 acres, at 1*l.* 6*s.* 6*d.* per acre, made the two years' value amount to 165*l.* Yates, J. Fines were arbitrary formerly, the estate being held at the will of the lord; but the law having now drawn the line, and copyhold estates being permanent, no more than two years' value can be taken. The lord has a right to two years' real intrinsic

^d Leake v. Lord Pigot, Stafford Summer Assizes, 1769, MSS.

^e It was proved by a surveyor to be about the value of 60*l. per annum.*

^f Two years' improved value, without any deduction, except for quit rents, Grant v. Astle, Doug. 727.

(36) "For nothing having been said at the time when the money was lent, as to the quantum of interest which should be paid for the loan of it, the law must determine that matter; and the broker having possessed himself of the pawn, upon the implied contract to restore it upon the principal and legal interest being tendered, the increase of the demand beyond what he must be supposed to have contracted for, and what the law prescribes, is a fraud; and the detention of the pledge, until such demand be satisfied, is a force, which might well induce the plaintiff to pay his money, and make such payment involuntary." Arg. MSS.

value of the land, and is not to be prejudiced by any collusive lease. It was necessary for the plaintiff to shew that he did not pay the fine voluntarily, but upon compulsion. The custom to take 10 *per cent.* on the purchase money, be it of ever so long a continuance, cannot bind, the law having fixed the rate in another manner (37).

6. Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another, if money is paid upon such contracts by the one, who, from their situation and condition, are liable to be oppressed and imposed upon by the other, the party paying is not considered as standing in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

The stat. 5 Geo. 2. c. 30. and the case of *Smith v. Bromley* will afford an illustration of this principle.

The stat. 5 Geo. 2. c. 30. s. 11. in order to prevent bad practices upon bankrupts who have not obtained their certificates, and who, for the sake of obtaining it, will submit, and cause their friends to submit, to any terms which a hard creditor may chuse to impose, vacates all securities given by the bankrupt or any person on his behalf, as the consideration for signing his certificate.

A creditor refused to sign the certificate of a bankrupt, unless a sum of money was given him by a friend of the bankrupt. The friend gave the money, and the creditor in consequence signed the certificate. It was holden, that this money might be recovered in an action for money had and received (38).

g *Smith v. Bromley*, Doug. 696. n. and Bull. N. P. 153. See an application of the principle of this case

by Buller, J. in *Nerol v. Wallace*, 3 T. R. 25.

(37) It was said in the course of this trial, that it was never yet settled, that a mandamus would lie to a lord of a manor to admit; but see post. tit. *Mandamus*.

(38) The plaintiff first brought his action against the agent who had transacted the business for the creditor, and had in fact received the money; but as it appeared that the agent had actually paid over, or accounted for, the money to his principal, Lord Mansfield, C. J. was of opinion, that the action would not lie against the agent, and the plaintiff was nonsuited. Doug. 696. n.

It is a general rule, that in cases of payments to a known agent,

In the preceding case, and in *Lowry v. Bourdieu*, Dougl. 471. Lord Mansfield, C. J. expressed an opinion, that the same principle applied to cases upon usurious contracts, where the debtor might recover from the creditor all beyond

the action for money had and received ought to be brought against the principal.

A. as receiver of W., received money for quit rents due to W. and gave a receipt for them as such. (Bull. N. P. 159.) An action for money had and received having been brought against A. to try W.'s right to the quit rents, it was holden, that the action would not lie, and that it ought to have been brought against W.; the court observing, that, in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases, as under notice, or *malis fide*. *Sadler v. Evans*, 4 Burr. 1984. In like manner it has been holden, that assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if the officer has paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553. In *Campbell v. Hall*, Cowp. 204. where an action for money had and received was brought against a custom-house officer to recover back some duties which had been paid to him, on the ground that the duties had not been imposed by a lawful or sufficient authority, it was stated in the special verdict that the money still remained in the hands of the defendant, not paid over by him to the use of the king, with the consent of his majesty's attorney-general, for the express purpose of trying the question as to the validity of these duties. [The student, who is desirous of further information upon the grand question agitated in *Campbell v. Hall*, is referred to the 2d volume of the *Canadian Freeholder*, in which the doctrine laid down by Lord Mansfield in that case is examined with great learning and ability, and censured by F. Maseres, Esq. cursitor baron of the Court of Exchequer.] If money be paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, money had and received will lie against the agent; and the mere passing such money in account, or making *rest*, without any new credit given, fresh bill accepted, or further sum advanced for the principal, in consequence of it, is not equivalent to a payment of it over. *Buller v. Harrison*, Cowp. 366. Recognized in *Cox v. Prentice*, 3 M. and S. 244. To the general rule, that in case of payment to a known agent, the action for money had and received ought to be brought against the principal, the following authority furnishes an exception. The plaintiff being a prisoner in the Coldbath-fields prison, of which the defendant was governor, contracted with defendant for the purchase of an annuity, and paid him 750l. as a consideration for it. This annuity was afterwards set aside, and the plaintiff called on defendant to refund. The defendant paid back 715l. 17s. but insisted that he was entitled

legal interest, in an action for money had and received, because the parties did not stand in *pari delicto*, and denied the authority of *Tomkyns v. Barnet*, Skinn. 411. and *Salk.* 22. where a contrary opinion had been holden at *Nisi Prius* by

to the remainder as due to him for the rent of a room, at one guinea per week, which plaintiff had been permitted to occupy during his residence in the prison. It was objected, that, by the regulations of the prison, the gaoler had no authority to let any room upon such terms. As an answer to this, the prison books were produced, by which it appeared that the governor charged himself with the guinea per week, and accounted for it to the court; and one of the visiting magistrates of the prison was called, who said, he was aware that there were such rooms, and that no objections had ever been made, and that the gaoler's book had been regularly passed at the quarter sessions. *Kenyon, C. J.* "I think this action may be maintained. — I am aware that it has been holden in the case of *Sadler v. Evans*, 4 Burr. 1084, that an action cannot be brought against an agent for money had and received to the use of his principal, but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county is not a corporate body, and therefore cannot be sued, except in those cases where acts of parliament have made it expressly liable. I am of opinion, therefore, that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover." *Miller v. Aris*, B. R. Middx. Sitt. after M. T. 41 Geo. 3. MS. The same doctrine, viz. that if a person gets money into his hands illegally, he cannot discharge himself by paying it over to another, was laid down by Lord Ellenborough, C. J. in *Townson v. Wilson and others*, 1 Camp. N. P. C. 396. There an action was brought to recover back money paid to parish officers by a person who had been taken up under a warrant as the putative father of a bastard child. The money had been paid for the purpose of indemnifying the plaintiff against all future charges which might accrue in respect of the child. The child died before all the money was expended; it was holden, that the plaintiff was entitled to recover the surplus, beyond the expenses of the lying-in and maintenance of the child, against the officers who had received the money, although it appeared that they were gone out of office, and had paid over to their successors the sum in question.

It should be remembered also that an agent cannot defend himself on the ground of having paid over the money; unless it appear that the money was paid to the agent for the purpose of paying it to the principal (as was the case of *Sadler v. Evans*, where the money was paid to the agent of Lady Windsor for Lady Windsor's use); for where plaintiff paid a sum of money to a bailiff, who had exceeded his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should

Holt, C. J. according to Skinner's, and by Treby, C. J. according to Salkeld's Report (39).

The same principle was recognized in the following case: An action for money had and received was brought to recover a sum of money as having been unduly obtained by the defendant from the plaintiff, under an agreement to compromise a *qui tam* action for penalties of usury, (which had been brought by the defendant against the plaintiff,) on the ground of certain usurious transactions, which had taken place between the plaintiff Williams, and one Eagleton. The sum sought to be recovered was the amount of the debt which had been owing from Eagleton to Hedley and his partner; and the jury, to whom the question was left at the trial, found that the payment of this debt of Eagleton, by the plaintiff to the defendant, was obtained from the plaintiff under the terror of the above-mentioned action of usury brought by the defendant, and then depending against him, and through the means of an agreement between the parties to compromise that action; and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the authority of *Smith v. Bromley*, and *Jaques v. Golightly*, as applied to the preceding facts, and founding themselves upon the distinction taken and relied upon in those cases in favour of the party for whose benefit the provisions of the law, which had been violated, were peculiarly made, and of whose situation advantage had been unduly taken, the court were of opinion, that this action was, under the circumstances of this case, maintainable.

The cases of *Shove v. Webb*, 1 T. R. 732, and *Scurfield v. Gowland*, 6 East's R. 241. (on the annuity act) furnish a further illustration of the same principle. See also *Clarke*

b. *Williams v. Hedley*, 8 East, 378.

be delivered over to any one in particular; it was holden, that plaintiff might maintain an action for money had and received against the bailiff, although the bailiff had in fact paid the money over to the sheriff, and the sheriff to the Exchequer. *Snowdon v. Davis*, 1 Taunt. 359.

(39) In *Alsop v. Milton*, B. R. E. 5 G. 3. MSS. Lord Mansfield, C. J. said, that *Tomkyns v. Barnett* had been denied to be law by Lord Talbot, Lord Hardwicke, and himself, for undoubted reasons; and the same case having been cited by Mr. Buller, in *Clarke v. Shee*, Cowp. 199. Lord Mansfield there said, that it had been denied a thousand times.

v Shee, Cowp. 197¹, where a clerk of the plaintiff had received money, and negotiable notes, from the plaintiff's customers, and paid them over to the defendant as premiums for illegal insurances in the lottery, it was holden, that the plaintiff, upon identifying his property, might recover it in an action for money had and received; for the plaintiff was not *particeps criminis*, and the money had come to the defendant's hands iniquitously and illegally, in breach of the statute.

One who had voluntarily offered to pay a sum of money for the use of the poor of the parish^k, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor, may countermand the application of the money before it is so applied, and may recover it back in an action for money had and received.

7. Where money has been paid by one of two parties to an illegal contract to a third person, for the use of the other party, an action for money had, and received will lie against such third person to recover it.

As, where money was paid by an underwriter to a broker for the use of the assured on an illegal contract of insurance^l, it was holden, that the assured might recover the money from the broker, on the ground, that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact of the money having been received by him to the use of the plaintiff, which created a promise in law to pay (40).

The same point was ruled in *Farmer v. Russell*, 1 Bos. & Pul. 296. in which case Buller, J. said, that the knowledge and participation of the defendant in the illegal contract could not make any difference in an action for money had and received, which was not founded on the illegal contract, but on a ground totally distinct from it. Heath, J. said, the distinction was, that whether the consideration was good or bad, a

i See ante *Jacques v. Golightly*, 9 Bl. k *Taylor v. Lendey*, 9 East, 49. R. 1072. and *Jacques v. Withy*, 1 M. l *Tenant v. Elliot*, 1 Bos. and Pull. 3. Bl. 65.

(40) Q. Can this decision be reconciled with *Sullivan v. Greaves*, *Park's Insurance*, 8. and ante, p. 63.

man might recover his own money, though not that of another person (41).

But where the money does not appear to have been actually paid into the hands of the defendant^a, but only an account stated between him and the other party to the illegal contract, in which the defendant has given credit to such party for the money, the court will not sustain the plaintiff's demand; for by so doing they would compel the execution of an illegal contract, as if it were a legal one (42).

8. Where money is paid by one of two parties to an illegal contract *to the other* (43), in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed (44), to recover

^a *Edgar v. Fowler*, 3 East, 220.

(41) In *Faikney v. Reynous and Richardson*, 4 Burr. 2069, it was holden, that the plaintiff was entitled to recover upon a bond given by the defendants to secure the repayment of a sum of money paid by the plaintiff to a third person on account of the defendants, on a settlement of stock-jobbing differences. The authority of this decision, however, was doubted in *Aubert v. Maze*, 2 Bos. & Pul. 371.

(42) Lord Ellenborough, C. J. observed, that in cases of illegal transactions, the money may always be stopped while it is in *transitu* to the person who is entitled to receive it.

(43) This rule is confined to the case of money paid by one of the parties *to the other*, as will appear from the 7th rule, and from the decision of *Cotton v. Thurland*, 5 T. R. 405. That was an action for money had and received, to recover back a sum of money which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing match between the plaintiff and another person. The court were of opinion that the action would well lie: Lord Kenyon, C. J. observing, that the action was brought, *not against one of the parties laying the wager, but a stake-holder*. "If the defendant had paid his money over to the winner, perhaps he would not have been answerable in this action, but here the money is still in the defendant's hands, and therefore I think the plaintiff may recover it from him."—Grose, J. concurred in opinion with Lord Kenyon, relying on the case of *Wilkinson v. Kitchin*, Lord Raym. 89. See further on this point *Tenant v. Elliot*, 1 Bos. & Pul. 3. and *Farmer v. Russell*, 1 Bos. & Pul. 296. and ante, p. 90, establishing the same doctrine, that money received by a third person, not a party to the illegal contract, *may* be recovered.

(44) There is a sound distinction between contracts executed and executory; and, if an action is brought to rescind a contract, you

the money back again, for in *parsi delicto potior est conditio defendentis* (45).

The plaintiff and defendant had laid a wager on the event

must do it while the contract remains executory, per Buller, J. in *Lowry v. Bourdieu*, Doug. 468. Heath, J. in *Tappenden v. Randall*, 2 Bos. & Pul. 471. speaking of the preceding observation of Buller, J. said, that it seemed to him that the distinction between contracts executory and executed, if taken with those modifications which Mr. J. Buller would necessarily have applied to it, was a sound distinction; that undoubtedly there might be cases where the contract might be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person; but where nothing of that kind occurred, he thought there ought to be a *locus penitentiae*, and that a party should not be compelled against his will to adhere to the contract. Rooke, J. in the same case, 2 Bos. & Pul. 471. said, that he wished it to be understood, that he fully acceded to the doctrine laid down by Mr. J. Buller, respecting contracts executory and executed. "In *Tappenden v. Randall*, the court considered the distinction between contracts executed and executory as established; the judges all make that distinction; it is not called in aid; it is the ground of their judgment." Per Sir James Mansfield, C. J. in *Aubert v. Walsh*, 3 Taunt. 281. Agreeably to this distinction was the case of *Walker v. Chapman*, (cited by Buller, J. in *Lowry v. Bourdieu*, Doug. 471). A sum of money had been paid in order to procure a place in the customs. The place had not been procured, and the party who had paid the money having brought an action to recover it back, it was holden, that he should recover; *because the contract remained executory*. See also *Wilkinson v. Kitchin*, Lord Raym. 89. *Pickard v. Bonner*, Peake's N. P. C. 221. and *Aubert v. Walsh*, 3 Taunt. 277. As to what shall be notice of rescinding the contract, see 4 Taunt. 290. The reader, however, should be apprised, that there is a case in which the circumstances were similar to those in *Walker v. Chapman*, and yet the decision was different. The case alluded to is that of *Norinan v. Cole*, C. B. Middx. Sitt. after M. T. 41 G. 3. 3 Esp. N. P. C. 253. There I. S. being under sentence of death in Newgate, the plaintiff was prevailed upon to lodge a sum of money in the hands of the defendant, to be applied to the purpose of procuring him a pardon. The pardon not having been procured, an action was brought to recover the money; but Lord Eldon, C. J. was of opinion, that the action was not maintainable; that where a person interposed his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure, and not from pecuniary motives.

(45) It must be admitted that the case of *Lacausade v. White*, 7 T. R. 535, militates against this position. There, money paid

of a horse race*, prohibited by stat. 13 G. 2. c. 19. s. 2. and deposited the money in the hands of a stake-holder; the event having terminated in favour of the defendant, the money was paid over to him, with the consent of the plaintiff, who afterwards brought an action to recover it back again; but it was holden, that it would not lie; for although the law would not have enforced the payment of it, yet, having been paid, it was not against conscience for the defendant to retain it (46).

The plaintiff and defendant*, who were lottery-office keepers, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he, whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it; the defendant's number being drawn, he chose the value of it, and received the same from the plaintiff; the agreement having been continued, the plaintiff's number was drawn, but the defendant refused to give the plaintiff either an undrawn ticket or the value, whereupon the plaintiff brought an action for money had and received, to recover the sum which he paid to the defendant on his number being drawn; it was holden, that

n *Howson v. Hancock*, 8 T. R. 575. o *Browning v. Morris*, Comp. 790.

on an illegal wager was recovered back, after the event upon which the wager proceeded had terminated against the plaintiff, the court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract. But it must be observed that Le Blanc, J. in *Vandyck v. Hewitt*, 1 East's R. 98. said, that the ground of the determination in *Lacussade v. White* had been very much canvassed in *Howson v. Hancock*, 8 T. R. 575. And *Lawrence, J.* in *Williams v. Hedley*, 8 East, 382. n. appears to have considered *Lacussade v. White* as over-ruled by *Howson v. Hancock*. And *Mansfield, C. J.* delivering the opinion of the court in *Aubert v. Walsh*, 3 Taunt. 284. speaks to the same effect.

(46) If A. agree to give B. money for doing an illegal act, B. cannot (although he do the act) recover the money by an action: yet if the money be paid, A. cannot recover it back again. *Webb v. Bishop*, Gloucester Lent Assizes, 1731, coram Reynolds, Ch. B. Bull. N. P. 16. 132. If plaintiff, who by defendant's authority, has laid illegal bets in defendant's name, upon losing, pays them without an express direction so to do, he cannot recover the amount from the defendant afterwards. *Clayton v. Dilly*, 4 Taunt. 165.

the action would not lie, because the plaintiff was not only in *pari delicto*, but also stood in the light of that species of insurer, from whom the statute meant to protect the unwary.

In like manner, where an insurance was made on a ship^p belonging to a British subject, without interest, (which is illegal by stat. 19 G. 2. c. 37.) it was holden, that the assured could not recover back the premium, after the ship had arrived safe; for the court will not interfere to assist either party, where they are in *pari delicto*.

On the same principle it was adjudged^q, that a premium paid by the plaintiff on a re-assurance of a ship, (void by stat. 19 G. 2. c. 37.) could not be recovered in an action for money had and received after the ship had been captured.

In like manner it has been holden^r, that the premium paid on an illegal assurance to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again, although the underwriters could not have been compelled to make good the loss.

So where the plaintiff had insured colonial produce^s on a voyage from the West Indies for Gibraltar, and the ship, on board which the goods were laden, was lost by the perils of the seas, it was holden, that the premium could not be recovered; because colonial produce cannot legally be shipped from the British West Indies for Gibraltar, and consequently the insurance was illegal. And, as every person must be taken to be cognizant of the law, the ignorance of the assured, at the time when the insurance was made, that the insurance was illegal, will not avail him.

And it must be observed here, that this rule holds even in cases where the premium is paid by a foreigner^t, although the policy is illegal by the municipal law of this country only, and not by the law of the country to which the foreigner belongs, e. g. the stat. 12 Car. 2. c. 18. s. 1., because the rigour of our great political regulations ought not to be relaxed in favour of foreigners offending against them, and there is very little reason to presume ignorance of laws peculiarly applicable to the subjects of a foreign state.

But where an insurance had been made on goods, at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made

^p Lowry v. Bourdieu, Doug. 467.

^q Andree v. Fletcher, 3 T. R. 266.

^r Vanlyck v. Hewitt, 1 East's R. 97.

^s Lubbock v. Potts, 7 East, 440.

^t Andree v. Fletcher, 3 T. R. 266, and

Morck v. Abel, 3 Bos. & Pul. 225.

after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated, it was holden, that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid, under ignorance of the fact of such hostilities⁷.

9. Where the contract is not *malum in se*, nor prohibited by any positive law, but is of such a nature that it cannot be put in force, merely because it would be inconvenient that the merits of the question should be publicly discussed, in such case, while the contract remains executory, money paid upon it by one of the parties to the other may be recovered.

A. in consideration of a sum of money paid to him by B., gave a bond conditioned for the payment of an annuity to B. until A. should make it appear to the satisfaction of B. that the hop duties should amount to such a sum in any one year. Before the day on which the first payment of the annuity was to have taken place, and before any payment had been made, B. applied to A. stating that he considered the bond to be illegal (47), and demanded a return of the consideration, which having been refused, B. brought an action against A. for money had and received: it was holden, that it would well lie; Rooke, J. observing, that "there was nothing criminal in this contract, nor had it been executed, nor was this a case where money, which has been paid over by a stake-holder, was sought to be recovered."

10. The proprietor of cattle wrongfully distrained damage-feasant⁷, who has paid money for the purpose of having his cattle re-delivered to him, cannot recover that money in an action for money had and received: 1. because such a mode of proceeding, would impose great difficulties on the defendant, by not apprising him of what he was to defend: 2. because the law has provided two specific remedies for trying questions of this kind, namely, actions of replevin and trespass (48).

■ Oom v. Bruce, 12 East, 925. See x Tappend v. Randall, 2 Bos & Pul
farther, Heatig v. Staniforth, B. R. 407.
E. T. 56 G. 3. S. P. y Lindon v. Hooper, Cowp. 414.

(47) Wagers on amount of the hop duties are neither illegal nor immoral, but the courts refuse to enforce them on account of public inconvenience. See Shirley v. Sankey, 2 Bos. & Pul. 130.

(48) In Anscomb v. Shore, 1 Camp. N. P. C. 235. it was holden,

But where an action for money had and received was brought against an overseer of the poor^a, to recover money in his hands, which had been levied by a sale of the plaintiff's goods on a conviction, which was afterwards quashed, the court held, that the action was maintainable for the clear money produced by the sale of the goods; for the plaintiff might waive the tort, and sue for the money really due.

So if a revenue officer seize goods as forfeited^b, which are not liable to seizure, and take money of the owner to release them, the owner may recover back the money in an action for money had and received (49).

11. In cases where the contract is legal, the plaintiff cannot recover on the *general* counts in an action of assumpsit, while the contract remains open, and not rescinded by the defendant: the only remedy is on the *special* agreement.

As where the defendant sold a horse to the plaintiff with a warranty of soundness^b, and the horse proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to take him back; an action for money had and received having been brought, it was holden, that it would not lie.

z *Feltham v. Terry*, Bull. N. P. 131. b *Power v. Wells*, Doug. 24. n. Cowp
cited in Cowp. 419. and 1 T. R. 337. 818 S. C.
a *Irring v. Wilson*, 4 T. R. 485.

by Sir J. Mansfield, whose opinion was afterwards recognized by the court, that an action on the case would not lie for detaining cattle distrained damage feasant, after a tender of amends, such tender not having been made until after the impounding.

(49) A question arose in this case, whether the officer was entitled to a month's notice, before the action was brought, under stat. 23 G. 3. c. 70. s. 30. in order to give him an opportunity of tendering amends. The court decided that he was not; Grose, J. observing, that the act was confined to actions of trespass or tort, and did not extend to an action of assumpsit, 4 T. R. 487. cited by Lord Ellenborough, C. J. in *Wallace v. Smith*, 5 East's R. 122. But see *Greenway v. Hurd*, 4 T. R. 553. where an excise officer having levied duties under an act which was repealed at the time when the duties were levied, Lord Kenyon, C. J. expressed an opinion, that the officer was entitled to notice, although the plaintiff sued in assumpsit; because the defendant acted as an officer of the excise when he received the money, and the plaintiff paid it to him in that character. There was, however, another point in the case, and it does not appear clearly on which the case was ultimately decided.

So where the plaintiff sold the defendant a pair of coach horses, which he undertook to take back if the plaintiff should disapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant, without making any new agreement. This the plaintiff also returned within a month, and received a third pair on the 23d of December, without making any new agreement. The plaintiff disapproved of the third pair, because they were restive and would not draw, and offered to return them on the 5th of January following, but the defendant refused to take them back, and, thereupon, the plaintiff brought an action against the defendant for money had and received. It was holden, that it would not lie; for the original special contract having been continued through all the subsequent dealings, the defendant ought to have had notice by the declaration, that he was sued upon that contract.

So where a seaman had contracted with the defendant to go a voyage from A. to B. and back again, with a stipulation, that he should not be entitled to his wages until the end of the voyage; it was holden, that he could not maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as B., though he had been wrongfully dismissed at B. by the defendant.

It must be observed, however, that where the contract is rescinded by the original terms of it, no act remaining to be done by the defendant, the plaintiff is entitled to recover back his money. As where plaintiff had paid to the defendant ten guineas for a chaise, on condition to be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. *per diem* for the time; the plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises without any consent on his part to receive it: the hire of 3s. 6d. *per diem* was tendered at the same time, which defendant refused as well as to return the money. An action for money had and received being brought for the ten guineas, it was holden, that it would well lie.

So where a contract is not carried into execution by reason of some negligence or default of one party¹, the other party, not having done any thing which can be considered as an execution of the contract in part, may abandon the contract

¹ Weston v. Dumas, Doug. 24
² Halk v. Heighstam, 2 East's R. 145

³ Tenner v. Barrett, 1 T. R. 126.
⁴ Gilles v. Edwards, 7 T. R. 181

and recover the money which he has paid on such contract: but this rule holds only where the contract can be rescinded *in toto*^g, so as to place both parties in the same situation they were in before. See further on this point, *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 351.

12. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money, unless it be against conscience that the defendant should retain it:

Hence, where a forged bill of exchange was drawn upon the plaintiff^h, which he accepted and paid to an innocent indorsee for a valuable consideration, and the plaintiff on discovering the forgery brought an action against the indorsee to recover back the money as money paid by mistake, it was holden, that the action would not lie; for it was not unconscientious in the defendant to retain the money when he had once received it, upon a bill for which he had given a fair and valuable consideration, without the least privity or suspicion of any forgery, and the plaintiff ought to have satisfied himself, whether the bill was really drawn upon him by the person whose name was subscribed to it.

13. It remains only to observe, that the consideration of this action must be *money*. Hence stock cannot be recovered in an action for money had and receivedⁱ; stock being a new species of property, and not money. But where, upon a wager of ten guineas to one, the stake-holder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was holden^j, that an action for money had and received would lie at the suit of the winner; Lord Ellenborough, C. J. observing, that provincial notes were certainly not money; yet, if the defendant received them as money, and all parties agreed to treat them as such at the time, he should not be permitted to say that they were only paper and not money. As against him it was so much money received by him. So where an insurance broker having received credit in an account with an underwriter for a loss, upon a policy, whereupon the name of the underwriter was erased from the policy; it was holden^k, that the principal might maintain an action for money had and received against the broker, although he had not actually received any money from the underwriter; for the broker having deprived the plaintiff of his remedy against the underwriter, and having

^g *Hunt v. Silk*, 5 East's R. 449. recognizing *Giles v. Edwards*.

^h *Price v. Neale*, 3 Barr. 1354. 1 Bl. R. 390. S. C. See *Marsh. R.* 453.

ⁱ *Nightlugal v. Devisme*, 5 Barr.

3509. See also *Jones v. Brinsley*, 1 East, 1.

^k *Pickard v. Banks*, 13 East, 20.

^l *Andrew v. Robinson*, 3 Camp. N. P. C. 199.

received credit in account for the money, he was estopped from saying that he had not the sum in his hands for the plaintiff's use.

III. Of the Declaration.

Venue.—The action of assumpsit being founded on contract is transitory (50), and consequently the venue may be laid in any county at the election of the plaintiff.

Where an action is brought in an inferior court, it must be stated in the declaration, that the cause of action accrued within the jurisdiction of the court. Hence in assumpsit in an inferior court, not the promise only, but the consideration^a also, on which such promise is founded, must be laid within the jurisdiction; for, the inferior court cannot hold plea unless the whole matter is within their jurisdiction^a; consequently, if a declaration for goods sold and delivered^a, or money had and received^a, or money paid^a, merely state that the defendant promised to pay within the jurisdiction, without stating the sale and delivery of the goods, or the receipt or payment of the money, to have been within the jurisdiction, it will be error; and error, even after verdict^a, for in this case nothing shall be intended to be within the jurisdiction, that is not expressly averred to be so^a.

Day.—The day mentioned in the declaration, on which the cause of action is stated to have accrued, is not material^a, provided it be a day after the cause of action accrued and before action brought. If the defendant by his plea makes the time material, the plaintiff may by his replication answer to that plea, without being guilty of a departure; as where the promise was laid on the first of May^a, 3 Car. 1. and the

m Ramsey v. Atkinson, 1 Lev. 50.

Whitehead v. Brown, 1 Lev. 96.

n Drake v. Beare, 1 Lev. 104, 5.

o Price v. Hill, 1 Lev. 137. Stope v.

Waddington, 1 Lev. 156. Hanslip

v. Coater, 2 Lev. 87. Wallock v.

Cooper, 2 Wils. 16.

p Trevor v. Wall, 1 T. R. 151.

q Heaven v. Davenport, 11 Mod. 965.
See ed.

r Winford v. Powell, Ed. Raym. 1310.

s Per Atkins and Scroggs, Jo 3 Mod. 197.

t Inkersalls v. Sammes, Cro. Car. 130.

u Lee v. Rogers, 1 Lev. 210.

defendant pleaded that the writ was first brought the 4th February, 14 Car. 2., and that he did not promise within six years before the said 4th February: replication, that he promised within six years before the said 4th of February: on motion in arrest of judgment, it was holden, that the replication was not a departure from the declaration; because the time in the declaration was not material.

So where the plaintiff declared upon a promise made* 26th March, 12 Geo. 1. the defendant pleaded, that after the promise, and before the bill filed, viz. 2d April, he tendered the money; the plaintiff replied, that after making the promise, viz. 12th February, he filed his bill: on demurrer it was objected, that plaintiff had brought his action, as appeared by his own shewing, before the cause of action accrued. But the court over-ruled the objection, observing, that as the plaintiff would not in evidence have been confined to the day in his declaration, there was not any reason he should be more confined in pleading; that in the case of a common assumpsit, the day was alleged for form only, and therefore, the defendant could not confine the plaintiff to the day alleged in the declaration (51).

Manner of stating the Contract.—In the action of assumpsit the declaration must state the contract, on which the action is founded, truly and correctly; that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a material variance between the contract alleged, and the contract proved, will be fatal†:

As where the contract alleged was, to deliver good “merchandise” wheat*, and the proof was to deliver good “second sort” of wheat, the plaintiff was nonsuited for the variance:

So where the plaintiff declared upon a contract for wages upon a certain voyage from London to Africa, and thence to the West Indies; but the proof was of a contract for a voyage from London to Africa*, and thence to the West Indies

* Mathews v. Spicer, Str. 806.

† Per Holt, C. J. Ld. Raym. 735.

† Cooke v. Munstons, 1 Bos. & Pul. N. R. 351.

* White v. Wilson, 2 Bos. & Pul. 116.

(51) A different rule holds in actions on promissory notes, where the day forms an essential part of the agreement. *Stafford v. Foster*, E. 1 G. 1. cited in *Cole v. Hawkins*, Str. 22, and reported in 10 Mod. 311.

or America, and afterwards to London, &c.; the variance was holden to be fatal, the contract proved being for a different voyage than that declared on.

So where the plaintiff had agreed to purchase of the defendant 100 bags of wheat^b, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, and the defendant had delivered 40 bags on the first market day, but had failed in delivering the remainder; in an action brought for the non-delivery of the residue, one count of the declaration stated the agreement to be for the delivery of 40 bags, and another for the delivery of 50 bags, in the first instance, but the contract was not stated in the alternative in any part of the declaration; the court held the variance fatal; for the contract ought to have been stated according to the *original* terms of it, which made it optional in the defendant to deliver 40 or 50 bags in the first instance, and not an absolute contract for the delivery of either of those quantities (52).

No where the contract was to deliver goods within fourteen days^c, or as soon as a certain vessel arrived; the vessel arrived after the fourteen days; and on breach of the contract, by non-delivery, the plaintiff declared, in one count on a contract by the defendant to deliver within fourteen days, and in another count to deliver on the arrival of the ship; but there being no count laying the contract in the alternative, the court held the variance fatal.

Assumpsit upon a warranty^d, that a horse was sound, in consideration that plaintiff would buy him at a certain price, to wit, 86l. 5s. with another count in consideration he had bought him; it appeared in evidence, that the horse was bought jointly with another at one entire price of 60 guineas. Lord Kenyon held the variance fatal.

The Consideration.—Every part of the entire considera-

^b Penny v. Porter, 2 East's R. 9.
^c Shipham v. Saunders, B. R. E. 93
Geo. J. 2 East's R. 4. n (a).

^d Hort v. Dixon, Middx. Sit. after M.
T. 27 G. 3. B. R. MSS. See also Symonds v. Carr, 1 Camp. N. P. C. 361.

(52) At the close of the first argument on this case, Lord Kenyon, C. J. said, that the opinion delivered by Lord Mansfield, C. J. in *Layton v. Pearce*, Doug. 15. viz. "that where a contract is optional in a party, and he makes his election, the option is thereby determined, and the contract may then be declared on, as an absolute contract," was extra-judicial. MSS.

tion for any promise contained in the agreement must be stated in the declaration. But in framing a declaration on an agreement^a, which consists of several distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement; it is sufficient to state so much of the agreement as contains the entire consideration for the act, and the entire act which is to be done, in virtue of such consideration. The rest of the contract, which respects the liquidation of damages only, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury, but not necessary to be shewn to the court in the first instance on the face of the record (53).

In like manner, where the plaintiff states the whole consideration truly^b, and then states those parts of the defendant's promise, the breach of which he complains of, truly and correctly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of. It is enough to state that part of the agreement truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated^c.

Idle and insufficient considerations do not form any essential part of the contract^d, consequently it is neither necessary to state them in the declaration, nor, if stated, to prove them. By the term "idle and insufficient considerations," must be understood such considerations as, if they stood alone unconnected with one or more sufficient considerations, would not support the promise of the defendant. They are distinguishable from illegal considerations; for, if one of the considerations, where there are two or more, is illegal, it will vitiate the whole contract, and the action cannot be supported; but an idle or insufficient consideration may be rejected; in truth, it is a nullity.

Executory considerations are traversable^e, and the per-

^a Per Lord Ellenborough, C.J. delivering the judgment of the court in *Clark v. Gray*, 6 East's R. 569, 570.

^f *Miles v. Sheward*, 8 East, 7.

^g *Tempest v. Rawling*, 13 East, 18. See also *Cotterill v. Cuff*, 4 Taunt. 285.

^h *Crisp v. Gamel*, Cro. Jac. 197.

ⁱ *Sexton v. Miles*, Salk. 22.

(53) "There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, adjustments of differences, &c. which are every day declared upon in the general form of a count for work and labour." Per Lord Ellenborough, C. J. S. C.

formance of them must be averred with time and place. In cases where the promise of the defendant is founded on two or more executory considerations, the performance of all must be fully and expressly averred; for an imperfect allegation of the performance of one only will vitiate the declaration. Where the consideration is executed, (in which case it is not traversable) and the promise to pay a sum certain, or to do or forbear from doing some specific act, the declaration proceeds at once from the statement of the contract to the breach, without any intermediate averment.

Breach.—The breach ought to be co-extensive with the promise, but not enlarged beyond it^a.

The promise was "to deliver a gelding in as good plight as he borrowed him"; the declaration averred, that he did not deliver him at all. After verdict for the plaintiff judgment was arrested, because the breach was not laid according to the promise. It will be sufficient, however, if the breach pursue the words of the promise^b.

Notice. Averment thereof.—Where the action does not lie without notice given to the defendant, an averment of such notice ought to be inserted in the declaration.

The defendant bought of the plaintiff a quantity of barley^c, and promised to pay him for it as much as he could get from any other person. The plaintiff averred in his declaration, that he afterwards sold the same quantity to J. S. for such a sum, but did not aver that the defendant had notice of the sum given by J. S.; for this omission the judgment was arrested: and this distinction was taken^d, that, if the agreement had been that the defendant should pay as much as J. S. paid, in that case, *quin constat de personâ* and he is indifferently named between them, the defendant at his peril should inquire of him, and the plaintiff was not bound to give notice; but where the person was altogether uncertain, there the plaintiff to entitle himself to the action ought to give notice.

See *Holmes v. Twist*, on error from B. R. in Exch. Ch. Hob. 51. to the same effect, where an averment of notice was holden necessary, on the ground that the matter rested

k *Leneret v. Rivet*, Cro. Jac. 503.
l 1 Rol. Rep. 43. 401. Hob. 106.
m Cro. Jac. 115.
n *Wright v. Johnson*, 1 Vent. 64.
o *Pitchard v. Kingston*, Cro. Car. 202.

p *Hall v. Hemmings*, Cro. Jac. 422. 1 Ro. Abr. 463. 1 25. 3 Bulst. 25, 6, 7. S. C.
q See *Ld. Raym.* 1127. where this case was put by Holt, C. J. *Brice v. Barra*, 1 Lev. 47. S. P.

in the privity and knowledge of the plaintiff alone: but where the conusance of the act to be done lies as well in the notice of the defendant as of the plaintiff, an averment of notice is not necessary; as where the act is to be done by a stranger' (54): so where an act is to be done by the plaintiff to a stranger' (55), as where the declaration stated, that, in consideration that the plaintiff had agreed to give his bond to J. S. for the debt of the defendant, the defendant promised to save him harmless, and avers that he gave the bond, and was sued, &c. An exception was taken, because it was not averred, that the plaintiff gave the defendant notice of his giving the bond; but it was over-ruled, because the defendant at his peril ought to take notice of the obligation, as in a bond to stand to an award (56).

Request.—Where a debt or mere duty is promised to be paid upon request, it is not necessary to make an actual request before action brought, and consequently an averment of such request in the declaration is unnecessary; for the bringing the action is a sufficient request.

In assumpsit upon a promissory note^a, payable four months after date, it was objected in error, that the request to pay the money on the note was laid upon the same day and year that the note was dated, which was four months before it became due; to this it was answered and adjudged by the court, that there was not any occasion to lay any request; that the bringing the action was a request in law, and it appeared, that the action was not brought until above a year after the note was due.

It is observable, however, that when the defendant is chargeable, upon a collateral promise to pay^a, do, or omit some act, *upon request*, and not for a mere debt or duty, an

^r Powle v. Hagger, Cro. Jac. 492.

^s Juxon v. Thorahill, Cro. Car. 132.

^t Bartlet v. Bartlet, Winch. 2. Vivian v. Shipping, Cro. Car. 325. Wallis v. Scott, 1 Str. 85.

^u Frampton v. Conison, 1 Wils. 33.

^x Birks v. Trippet, 1 Salk. 32. Selman v. King, Cro. Jac. 109. Hill v. Wade, Cro. Jac. 523 and 2 Roll Rep. 62.

(54) That is, a stranger named and agreed upon between the parties, agreeably to the distinction taken in Cro. Jac. 432. and ante.

(55) See the preceding note.

(56) Notice need not be given of a matter which a person is awarded to do, because he may inquire of the arbitrator. See Powell, J. in Smith v. Goffe, Lord Raym. 1128. See also 8 Rep. 92. b. S. P.

actual request ought to be made before action brought, and consequently, it ought to be averred in the declaration; and the day, year, and place, where the request was made, must be expressed, as in such case the request is parcel of the duty.

Hence it will appear, that the general averment "although often requested," is not sufficient in a case of this kind, not on account of the word "although," because that has been determined^y to be an express averment, and equivalent to the words "the plaintiff in fact says," or any other words of averment, but because time and place are omitted.

Formerly indeed the omission of time and place was considered as a defect in substance, and as good ground for general demurrer, or arresting the judgment^z, and some modern cases^a also appear to support the same doctrine; but in a very late case^b it was solemnly decided, that, since the statute^c for the amendment of the law, such defect can be taken advantage of by special demurrer only, and cannot be a ground for arresting the judgment even after a judgment by default; because it is an omission "of a like nature," or rather of a less material nature than those specified in the statute, such as the *prout patet per recordum, hoc paratus est verificare*, &c. and consequently cured by the healing operation of that statute.

Having exhibited to the student a general outline of the declaration in assumpsit, I shall proceed to a full explanation of some special averments which are requisite in particular cases, beginning with conditions precedent (57).

Of Conditions precedent.—1st. If A. promise to do, or to abstain from doing, a certain act, in consideration of the antecedent performance of some act or promise on the part of B., the promise of A. is called a dependent promise; because B. has a right of action for a breach of such promise de-

y 3 Leon. 27.

z Hill v. Wade, Cro. Jac. 593.

a Bach v. Owen, 5 T. R. 409.

b Bowdell v. Parsons, B. R. M. 49 G

3. 10 East, 359.

c 4 Ann. c. 16. s. 1.

(57) These remarks would have followed more naturally after the paragraph relative to executory considerations; but as they run to great length, I thought it better to postpone them, in order that the learning relative to the principal points, which ought to be attended to in framing the declaration in ordinary cases, might be reduced within as narrow a compass as possible, and presented to the reader at one view.

pend on the prior performance (or that which is equivalent to performance) of the act or promise on the part of B.; and the act or promise to be performed by B. being in the nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise precedes B.'s right of action to recover damages against A. for the non-performance of his promise, and must be specially averred in the declaration.

The plaintiff declared that the defendant was possessed of 17 tod of wool⁴, and that there was a conversation between them for 15 tod of the 17 tod *to be chosen by the plaintiff*; the defendant, in consideration of a sum of money to be paid on such a day, promised to deliver to the plaintiff the aforesaid 15 tod of wool, and averred that he was ready at the day to pay the defendant the money, yet the defendant had not delivered the wool; after non-assumpsit pleaded, and a verdict for the plaintiff, an exception was taken in arrest of judgment, because the plaintiff had not shewn that he had chosen 15 tod out of the 17, which is *quasi a condition precedent*, and an act to be first performed by the plaintiff before the defendant is bound to do any thing; which was assented to by the whole court.

The case of *Thorpe v. Thorpe*, Easter, 13 W. 3. Lord Raym. 662. Salk. 171. S. C. Rot. 253. has been considered as a leading case on this subject.

The declaration in that case stated*, that the defendant held of the plaintiff certain lands by way of mortgage, that the plaintiff *agreed* to make a good and sufficient release of his equity of redemption, *in consideration whereof* the defendant promised to pay to the plaintiff a certain sum of money; and that the plaintiff in consideration of the said agreement, and that the plaintiff would perform his part of the agreement, promised to perform his part; and assigned for breach, that although the plaintiff had performed every thing contained in the agreement to be performed on his part, yet the defendant had not paid the sum of money agreed on; the defendant pleaded a release, of which the plaintiff craved oyer, and then demurred.

It was insisted, on the part of the defendant, that this action was founded, not upon the making the release of the equity of redemption, but upon the *promise* to make it, and consequently the plaintiff had a right of action at the

* *Rayney v. Alexander*, Yelv. 76.

• See Record, 1 Extra. 245.

time of the promise made; and then the release of all demands, ~~the~~ coming afterwards, released it, and was a good bar to the action. To this it was answered and resolved by the court, that, if there had been a positive agreement, that the plaintiff should release the equity of redemption, and that the defendant should pay the money, the plaintiff might have maintained an action before he had made such release; but here the promise was "in consideration whereof," which made the release on the part of the plaintiff to be a condition precedent. *Holt, C. J.* then entered into the distinction between positive agreements and conditions precedent, and observed, that in the case of conditions precedent, an action could not be maintained before performance: but in the case of positive agreements it was otherwise: he then laid down the following rules:

1. If a day be appointed for payment of the money, and the act for which the money is to be paid, cannot be done before the day appointed, then, though the agreement be to pay the money for the doing the thing, yet the action may be brought for the money before the thing done; because the agreement is positive, that the money shall be paid at the day appointed.

With respect to the reasonableness of this rule, the Chief Justice observed, that the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the thing for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement.

2. Though a day certain be appointed for payment of the money, yet if the day is to incur *after* the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money.

The chief justice then adverted to an objection which had been made to the declaration (*viz.*) that the plaintiff had not sufficiently averred, that he had made a release of the equity of redemption; for he ought to have shewn *how* he had done it, in order that the court might judge whether it was done according to the agreement. The chief justice admitted, that the plaintiff in his declaration ought to have shewn the time and place when and where the release was executed, and how the equity of redemption was released, and that for want of that, this declaration would have been ill on demurrer; but, he added, that the defendant, by

pleading over had admitted that the release of the equity of redemption was properly made, and thereby aided this defect in the declaration.

A similar exception was made in the following case^f: In assumpsit by the vendor against the vendee of land for not performing an agreement to purchase on certain terms; the plaintiff in his declaration alleged that he was seized in fee of the land in question, and that the defendant agreed to purchase it *on having a good title*, and then averred, that the title to the land *was made good, perfect, and satisfactory* to the defendant: on demurrer (58), it was holden that it was not necessary for the plaintiff to set forth in the declaration all the particulars of his title, and that the averments in the present case were sufficient to enable the plaintiff to call upon the defendant for the non-execution of his part of the agreement (59).

But in a prior case^g, where the purchaser of a copyhold estate had agreed to make a deposit, and pay the remainder of the purchase money, at a certain time, on having a good title and a proper surrender made to him, an action having been brought by the seller for the non-performance of the conditions on the part of the purchaser, wherein the seller alleged that he had been *always ready and willing*, and frequently offered to make a good title to the estate, and to make a proper surrender of it, on payment of the purchase money, it was holden not sufficient, but that the plaintiff ought to have averred that he actually made a good title and surrendered the estate to the purchaser, *as a tender and refusal*, and ought also to have shewn *what* title he had.

It has been already observed that in the cases of condi-

^f Martin v. Smith, 6 East's R. 555.

^g Phillips v. Fielding, 9 H. Bl. 123.

(58) It was a special demurrer to the replication; but the plea and replication being admitted to be bad, the question turned wholly on the sufficiency of the declaration.

(59) In debt for a penalty against one who had articted to purchase land, it was objected that the plaintiff had stated, in the declaration, only that he was ready and willing to make a good title, but had not shewn what title. Lord Loughborough, C. J. in delivering judgment, thought that the objection was well founded, and that the plaintiff ought to have set forth his title. *D. of St. Albans v. Shore*, 1 H. Bl. 270. But see the remarks of Lord Ellenborough, C. J. and Lawrence, J. on this opinion of Lord Loughborough, 6 East's R. 561, 562.

tions precedent, either performance, or that which the law considers as equivalent to performance, must be specially averred in the declaration. A tender and refusal has been deemed to be equivalent to performance, and an averment to that effect is sufficient, but an averment of a tender alone without refusal is not^b.

Where the act is to be done at a particular time and place, if the party to whom the act is to be done does not attend, an actual tender becomes impossible; here then a tender in law will be sufficient; but to support this, it will be incumbent on the party who is to make the tender to shew, that he has done every thing, as far as in him lies, towards the execution of the contract, as will appear from the following cases:

In covenant (60) for not accepting stock of the Hudson's Bay Company¹, at the company's house, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to the *Hudson's Bay House* and accept the stock, and that the plaintiff was ready there at the day, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c.; upon demurrer, the declaration was holden ill; for where the party to whom the act is to be done does not come at the time and place appointed, the other ought to shew that he came at the last time of the day which the law has appointed for the doing the act; and if he came there before, he ought to shew that he continued there to the last time. And that as the stock could only be transferred when the Company's house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the company in that respect, and that he came there at the proper time, and staid there until after the house was shut.

So where in assumpsit^a for not accepting stock agreed to be transferred by the plaintiff at the request of the defendant, the plaintiff averred that he was ready and willing, and

^a *Lea v. Exelby*, Cro. Eliz. 888. Salk. 623. S. P.

Raym. 696. Com. Rep. 116. 2 Salk 623. and 12 Mod. 529

ⁱ *Lancashire v. Killingworth*, Ld.

^k *Bordenave v. Gregory*, 5 East's R. 107.

(60) This case in strictness belongs to another title; but as I am not aware of any distinction between covenant and assumpsit, in respect of the doctrine here laid down, and as the reasoning of this decision was adopted in the succeeding case, I have availed myself of this opportunity of inserting it.

offered to transfer, and requested the defendant to accept the stock, which he refused; and it appeared in evidence that the contract for the sale of the stock was made on the 5th of May, 1803, a little before 12 o'clock at noon: but there was not any proof of any direct application made to the defendant to accept the stock on that day, nor was it shewn that the plaintiff had waited until the closing of the transfer books at the bank for the defendant to appear and accept the transfer; but a few days afterwards an offer was made of the stock, which was then refused; on motion for setting aside the verdict which had been given for the plaintiff, it was holden, that the allegations of the declaration were not supported by the evidence; Lord Ellenborough, C. J. observing, that the plaintiff could not sustain the action without shewing a tender of the stock and refusal, or that which in law was tantamount to a tender and refusal; and that must be by shewing either *an actual* tender and refusal, which was not pretended to have been done in this case until after the 5th of May, (the day on which it was evident that the contract was meant to be performed, the price being calculated accordingly); or by shewing that the plaintiff staid at the bank to the last time of that day when a tender could have been made, which was so long as the transfer books remained open, and that he was there ready to have transferred, if the defendant had been there and would have accepted the stock; which would have been a sufficient substitution of the more formal evidence of an actual tender and refusal; but here there was neither a tender in fact, nor in law.

Concurrent Acts.—2ndly. Where it is agreed that two concurrent acts shall be performed, the one by A. and the other by B. at the same time, one party cannot maintain an action against the other without averring either performance, or that which is equivalent to performance of his part of the agreement. (61):

As where the declaration stated¹, that in consideration that the plaintiff had bought of the defendant a quantity of

1 *Morton v. Lamb*, 7 T. R. 125. cited 2 N. R. 235, 240. *Smith v. Woodhouse*.

(61) "If two men agree, one that the other should have his horse, the other that he will pay ten pounds for it, an action does not lie for the money, until the horse be delivered." Per Holt, C. J. in *Thorpe v. Thorpe*, Salk. 171, 2.

wheat at a certain price, to be paid by plaintiff to defendant, defendant undertook to deliver the wheat to plaintiff at S. in one month from the time of sale, and then averred, that although plaintiff always from the time of sale, for one month following and afterwards, was ready and willing to receive the corn at S., yet the defendant had not delivered the same: after verdict for the plaintiff, upon the general issue, judgment was arrested; because it was not averred, that the plaintiff had tendered to the defendant the price of the corn, or that he was ready to have paid for it on delivery: Lawrence, J. observing, that "he considered this as an agreement by the defendant to deliver the corn at S. on being paid for it; that the payment of the money was to be an act concurrent with the delivery, and said the case was like that of *Callonel v. Briggs*, Salk. 112, 113; where, on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock; Holt, C. J. said, 'if either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender;' he did not say, that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration. The tendering of the money by the plaintiff made part of the plaintiff's title to recover, and he must set forth the whole of his title."

But, after verdict (62); an averment, that the plaintiff was ready and willing to perform his part of the contract, has been holden sufficient:

As where assumpsit was brought for the non-delivery of a quantity of malt^m, which the plaintiff had bought of the defendant at a certain price, and which defendant undertook to deliver on request; and the plaintiff averred, that although on, &c. at, &c. he requested the defendant to deliver the malt, *and was then and there ready and willing to pay the defendant for the same, according to the terms of the sale, and although he was then and there ready and willing and offered to accept and receive the malt from the defen-*

^m *Rawson v. Johnson*, 1 East's R. 203.

(62). This proposition is qualified by confining it to cases after verdict, because it has not as yet been determined, that an averment of this kind would be good upon demurrer. It must, however, be admitted, that some of the judges (especially Lawrence, J.) in *Rawson v. Johnson*, seem to have been of opinion, that such an averment would have been sufficient even on demurrer.

dant, yet he did not deliver the same; after verdict for the plaintiff, it was moved, in arrest of judgment, that the declaration was defective, because it only averred a readiness and willingness in the plaintiff to pay for the malt, and did not aver an actual tender of the price agreed upon; but the court over-ruled the objection, and held the averment sufficient.

So where the declaration stated, that the plaintiff had bought of the defendant a quantity of oats at a certain price per quarter, which defendant had undertaken to deliver some time between Michaelmas and Lady-day; and although the defendant did, in part performance of his promise, deliver to the plaintiff a part of the oats, and although the time for the delivery of the residue was long since elapsed, and the plaintiff was during all that time, and still is, ready to receive the residue of the oats, and pay for the same, at the price agreed upon, yet the defendant had not delivered the same. After verdict for the plaintiff, an objection was made in arrest of judgment, because it was not averred in the declaration, that plaintiff had performed his part of the contract by tendering the price of the corn. But the objection was over-ruled by the court, and on the authority of the preceding case of Rawson v. Johnson, they held the averment sufficient.

In an action for not delivering a quantity of oil, the declaration contained an averment, *that the plaintiff was always ready and willing to accept it, and pay for the same on the terms agreed upon*; yet the defendant would not deliver it, whereby, &c. The plaintiff proved the contract, and a demand, on his part, of the oil in question; but it was objected, on the part of the defendant, that the plaintiff should have proved that he was ready and willing to pay for the oil. Gibbs, C. J. was of opinion, and the court afterwards concurred with him, that the delivery of the oil and payment for it were to be concurrent acts; and that it was not necessary for the plaintiff to prove that he had offered the money to the defendant, till the defendant was ready to perform his part of the contract by delivering the oil. By the demand which he made on the defendant, he proved himself to be ready and willing to pay for the oil when delivered.

Where it is agreed that some act shall be performed by each of two parties at the same time, he who was ready and

¹¹ Waterhouse v. Skinner, 9 Bos. & Pul. 467.

¹² Wilks v. Atkinson, 1 Marsh. 419.
¹³ Jones v. Barkley, Doug. 684.

offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part of the agreement.

Mutual Promises.—3rdly. Where there are mutual promises, and the mere promise, and not the performance thereof, is the consideration of the agreement (63), there an action may be maintained^q by either party^r, without averring performance of the agreement on his part:

As where the declaration stated, that it was agreed that a race should be run between an horse of the plaintiff and one of J. S.'s and, in consideration that the plaintiff had agreed to deliver to the defendant a quantity of cloth, the defendant agreed to pay the plaintiff a sum of money in case J. S.'s horse should beat the plaintiff's horse, and then averred, that J. S.'s horse won the race. After verdict for the plaintiff, an exception was taken in arrest of judgment, because it was not averred in the declaration, that the cloth was delivered to the defendant; but the court over-ruled the exception, observing, that this was an action founded on mutual promises, and, therefore, it was not necessary for the plaintiff to make an averment of the delivery of the cloth; and Denison, J. took this distinction, "where a plaintiff declares, that in consideration he would deliver to the defendant a piece of cloth, he, the defendant, should pay a sum of money for it; an averment of the delivery of the cloth is necessary; but, if the plaintiff states an agreement, and then states that in consideration of such agreement, &c. in that case an averment is not necessary."

Having thus illustrated the nature of conditions precedent, concurrent acts, and mutual promises, it remains only to add, that there are not any technical words by which any of these considerations are constituted. The principal difficulty in the construction of agreements consists in discovering, whether the consideration be a condition precedent, a concurrent act, or a mutual promise. This, however, must be collected from the apparent intention of the parties to the agreement. The intention of the parties^s is, or is

^q Hob. 106.

^r *Martindale v. Fisher*, 1 Wils. 28

^s *Per Grose, J. in Glazebrook, v. Wood-*

row, 3 T. R. 372. per Sir J. Mansfield in *Smith v. Woodhouse*, 2 Bos. & Pal. N. R. 240.

(63) "Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement." Per Lawrence, J. in *Glazebrook v. Woodrow*, 3 T. R. 373

assumed to be, the governing principle of all the late determinations. When the nature of the consideration is ascertained, the rules respecting the averments before laid down invariably hold. If the reader wishes to pursue this subject further, he will find the cases relating to it fully collected, and commented upon, in Mr. Serjeant Williams's edition of Saunders, vol. i. p. 320. n. 4. vol. ii. p. 352. n. 3. See also Mr. Durnford's note in Willes's Rep. p. 157. and post, tit. Covenant.

IV. *Of the Pleadings:*

1. *Of the General Issue, and what may be given in Evidence under it.*
2. *Accord and Satisfaction.*
3. *Infancy.*
4. *Payment.*
5. *Release.*
6. *Statutes,*
 1. *Of Limitation.* 2. *Of Set-off.*
7. *Tender.*

I. *Of the General Issue and what may be given in Evidence under it.*

1. *General Issue.*—THE general issue in this action is non assumpsit. If by mistake not guilty be pleaded, instead of non assumpsit, such plea will be bad on demurrer^t, but aided after verdict^u.

To a declaration in assumpsit consisting of several counts upon several promises, the defendant may plead non assumpsit generally^x.

The general issue may be pleaded, if there has not been any contract between the parties, or if the real contract be

^t *Marsham v. Gibbs*, 3 Str. 1029. and
Ca. Temp. Hard. 173. Adjudged on
special demurrer.

^u *Elrington v. Doehant*, 1 Lev. 143.
Cerby v. Brown, Cro. Eliz. 476.
^x *Taylor v. Wilson*, Cro. Car. 219.

different from that on which the plaintiff has declared; e. g. if the contract was made with the plaintiff, and other persons not named in the action^y (64); or if the contract was made with the plaintiff only, and the action is brought by the plaintiff and another^z.

Under the general issue every thing may be given in evidence which disaffirms the contract; e. g. the coverture of the plaintiff (65) or defendant *at the time of making the contract*^a. In like manner the defendant may give in evidence, in order to avoid the contract, gaming^b, infancy^c, usury^d.

If the contract be good in law, and not performed, the defendant may, under the general issue, in certain cases, give in evidence some legal excuse for the non-performance of it, as accord with satisfaction^e, a discharge before breach^f, (66), foreign attachment^g, or a release^h. *because all these are legal excuses, and the cause of action is destroyed.*

y Per Raymond C. J. *Leglise v. Cham-*
pante, Str. 920.

z *Welford v. Wood*, 1 Esp. N. P. C.
182.

a Adm. in *James v. Fowks*, 12 Mod.
101. and daily practice at Nisi Prius.

b Adm. by the Court in *Hussey v. Ja-*
cob, Lord Raym. 89.

c *Darby v. Boucher*, Salk. 279; *Sea-*
son v. Gilbert, 2 Lev. 144.

d *Bernard v. Saul*, Str. 406, and *Fork*,
336. cited in Bull. N. P. 189.

e Adm. per Holt, C. J. in *Paramour*
v. Johnson, 12 Mod. 376. Id. Raym.
586. S. C.

f *Welles v. Needham*, Lord Raym.
180. *Nathan v. Giles*, 5 Taunt.
553. S. P.

g *Miller v. Aris*, *Middlesex Sittings*
after M. T. 41 G. 3. per Kenyon C. J.
MSS. *Hawley v. Peacock*, 4 Camp.
N. P. C. 558. S. P.

(64) In an action on a tort, a different rule holds; for there, if one only of several persons, who ought to join, bring the action, the defendant can take advantage of it by plea in abatement only, although the defect appear on the face of the declaration, *Addison v. Overend*, 6 T. R. 766. 5 East's R. 407. except for the purpose of preventing the plaintiff from recovering any more than his share of the damages. *Nelthorpe v. Dorrington*, 2 Lev. 113. Indeed in assumpsit against one or more defendants, if any of the persons who ought to be joined are omitted, the defendant can only take advantage of it by a plea in abatement. *Rice v. Shute*, 5 Burr. 2611. *Abbot v. Smith*, 2 Bl. R. 947. *Germain v. Frederick*, B. R. T. 25 G. 3. 1 Saund. 291. c. Serjeant Williams's edit. *Dixon v. Bowman*, Mich. 1776, there cited. *Evans v. Lewis*, Exchequer, E. 1774. 1 Saund. 291. b. S. P.

(65) But if the plaintiff take husband after the suing out of the writ, and before declaration, the defendant can take advantage of the coverture by plea in abatement only. *Morgan v. Painter*, E. 25 G. 3. B. R. 3 T. R. 266.

(66) A promise, before it is broken, may be discharged by a pa-

Matter of law, which amounts to the general issue, may be pleaded or given in evidence^h.

Payment, before action brought, may be given in evidence, under the general issue.

2. Accord and Satisfaction.

2. *Accord and Satisfaction.*—Accord with satisfaction is a good plea in bar to this actionⁱ, because damages only are recoverable; and accord with satisfaction to one defendant is a bar to all^k.

This plea is frequently pleaded specially; but it may be given in evidence on the general issue^l (67).

An accord to make a good plea must be perfect, complete, and executed^m; for an accord executory is only substituting one cause of action for another, which might go on to any extent. Hence, a plea of accord to do several thingsⁿ, with an averment of performance of some only, and of an offer to perform the rest, is bad. So where to an assumpsit on a promissory note, the defendant pleaded an agreement^o between the defendant and plaintiff, with other creditors of the defendant, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, and then averred a tender and refusal on the part of the plaintiff of the composition: on demurrer, the plea was hoklen bad.

Acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater.

To an action of *indebitatus assumpsit* for 15l.^p the defen-

^h James v Fowke, 12 Mod. 101.

ⁱ Dyer, 75 b.

^k 9 Rep. 79 b.

^l See ante, p. 115

^m *Peyton's case*, 9 Rep. 79 b.

ⁿ Shephard v. Lewis, T. Jones, 6.

^o *Heathcote v. Crookshanks*, 2 T. R. 24.

^p *Cumber v. Wane*, Str. 426.

not agreement, but after it is broken it cannot be discharged without deed, by any new agreement, without satisfaction. Per Holt, C. J. 12 Mod. 538. S. P. adm. in *Edwards v. Weeks*, 1 Mod. 262.

(67) "It is indulgence to give accord with satisfaction in evidence, upon *non assumpsit*, but it has crept in, and is now settled." Per Holt, C. J. 12 Mod. 377.

dant pleaded, that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction; the plaintiff put in an immaterial replication, to which the defendant demurred: after judgment for the plaintiff in C. B. it was objected on error in B. R. that the plea was ill, it appearing that the note for 5*l.* could not be a satisfaction for 15*l.*; and per Pratt, C. J. we are all of opinion that the plea is not good; as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction which he agrees to accept, and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction. If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another bond has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment. Judgment affirmed (68).

So where in an action of *indebitatus assumpsit* for goods sold and delivered, to which the defendant pleaded non assumpsit, it appeared, that the defendant, prior to his insolvency, was indebted to the plaintiff in 50*l.* for goods sold and delivered; that the defendant, in consequence of his insolvency, had compounded with all his creditors, and paid them 7*s.* in the pound, and at the time of such payment to the plaintiff, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before action brought. To meet this case, the defendant produced a receipt signed by the plaintiff for the composition of 7*s.* in the pound for his debt, which he acknowledged to be in full of all demands, and then insisted

q *Manhood v. Crick*, Cro. Eliz 716. r *Fitch v. Sutton*, 5 East's R. 230.
Cro Car 25 and *Lovelace v. Cochet*,
Hob 68, 69. S. P.

(68) Lord Ellenborough, C. J. in speaking of this case of *Cumber v. Wane*, in *Fitch v. Sutton*, 5 East, 232. observed, that though it had been said by him in argument, in *Heathcote v. Crookshank*, 2 T. R. 26. to have been denied to be law, and in confirmation of that, Buller, J. afterwards referred to a case (stated to be that of *Hardcastle v. Howard*, H. 26 G. 3.) yet he (Lord Ellenborough) could not find any case of that sort; on the contrary, the decision in *Cumber v. Wane* was directly supported by the authority of *Pinnel's case*, 5 Rep. 117. and it did not appear that *Pinnel's case* had ever been questioned.

that this receipt was a discharge of the promise. A verdict having been found for defendant, on a motion for a new trial, *Knight v. Cox*, Bull. N. P. 153. was cited for the defendant, where the creditor having accepted a composition, and signed a release to the defendant, who in consideration thereof promised to pay him the entire debt, it was holden, that the release was a good defence to an *indebitatus assumpsit* for the original cause of action: But Lord Ellenborough, C. J. said, in that case the original contract was extinguished by the release: but it could not be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release; it was impossible to contend that an acceptance of 17*l.* 10*s.* was an extinguishment of a debt of 50*l.*: He added, that there must be some consideration for the relinquishment of the residue,—something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement was *nudum pactum* (69). But the mere promise to pay the rest when of ability, put the plaintiff in no better condition than he was in before. Rule for new trial, absolute.

‘But the defendant may plead’ that he was the payee of a promissory note, and that he indorsed it to the plaintiff on account of the debt sued for; because, though the promissory note is not a security of a higher nature than the simple contract debt sought to be recovered in the action of *assumpsit*, yet it gives the plaintiff the advantage of holding a third person liable to him.

It will be observed, that, in the preceding case, the security was given for the whole debt; and this seems necessary to entitle the party to plead it in bar; for where a debtor had compounded with his creditors, giving them the security of a third person for payment of *part* of the stipulated dividend, it was holden, that he was not discharged upon payment of that part only, the residue continuing unpaid.

And further; although if creditors simply agree to accept less from their debtor than their just demand, that will not bind them; yet, if upon the faith of such an agreement a

s *Kearlake v. Morgan*, 5 T. R. 513.

t *Walker v. Seaborne*, 1 Taunt. 526.

(69) In *Lynn v. Bruce*, 2 H. Bl. 317. it was holden, that an agreement to accept a composition in satisfaction of a debt was not a sufficient consideration to support a promise by the debtor to pay the composition.

third person (also a creditor) be induced to become surety for any part of the debts, on the ground that the party will be thereby discharged, the agreement, though not under seal, will be binding; and a creditor, after the security given has been paid, cannot sue for the residue of his demand; for that would be a fraud on the surety^u.—N. It did not appear, in this case, that the plaintiff had induced any of the other creditors or the surety to sign the agreement.—If the creditors sign an agreement to give the debtor time for the payment of their respective demands and to take his promissory notes for the amount, they cannot sue for the original cause of action, without proving that the agreement has been broken on the part of the debtor^v.

3. Infancy.

3. *Infancy*.—The defendant may either plead specially, or give in evidence on the general issue *non assumpsit*, that he was an infant at the time of making the promise (70).

This privilege of avoiding contracts, which the law confers on such as enter into them during their minority, that is, (by the law of England) within the age of 21 years, is a personal^w privilege, the benefit of which must be claimed by the infant, and which cannot be exercised for him by any other person.

The plea of infancy ought not to be pleaded by attorney, but by guardian; for an infant cannot appoint an attorney.

In cases where the contract declared on by the plaintiff has been made with the infant for necessaries suitable to his estate and degree, the plea of infancy will not operate as a bar to the plaintiff's demand; for the law permits an infant to bind himself, either by simple contract, or single bill^x, for

^u *Steinman v. Magnus*, 2 Camp. N. P. C. 124. 11 East, 390. See also *Bradley v. Gregory*, 2 Camp. N. P. C. 383.

^x *Barthley v. Sowden*, 3 Camp. N. P. C. 175. But see *Cranley v. Hillary*, 2 M. and S. 123.

^y *Season v. Gilbert*, 2 Lev. 144.

^z Per Eyre, C. J. in *Keane v. Boycot*, 2 H. Bl. 515 and *Ellenborough, C. J. in Taylor v. Croker*, 4 Esp. N. P. C. 137.

^a *Russel v. Lee*, 1 Lev. 86, 87.

(70) Payment of money into court will not preclude a defendant from availing himself of his infancy, because the money may have been paid into court for necessaries. Per Buller, J. in *Hitchcock v. Tyson*, 2 Esp. N. P. C. 481. n.

necessaries^b, (viz.) necessary meat, drink, apparel, proper instruction, and the like; hence it frequently becomes a question, what are necessaries.

In an action for goods sold and delivered^c, it appeared that the goods in question were a livery for a servant of the defendant, who was a captain in the army, and cockades for some of the soldiers belonging to his company. The defendant relied on his infancy, insisting that the goods in question were not within the description of necessaries: the judge left it to the jury to consider whether the livery was not suitable to the degree, and the cockades a necessary expense, incidental to his situation; and the jury, being of that opinion, found a verdict for the plaintiff. On a motion for a new trial, Lord Kenyon, C. J. said, that the cockades could not be considered as necessaries for the defendant, and ought not to have been included in the damages; but with respect to the livery, he could not say that it was not necessary for a person in the situation of defendant to have a servant (71); and if it was proper for him to have one, it was necessary that the servant should have a livery. The Chief Justice added, that however inclined he was in general to protect infants against improvident contracts, yet he thought this case fell within the fair liability which the law imposed on infants of being bound for necessaries, which was a relative term according to their station in life (72). The rule for a new trial was discharged, the plaintiff's counsel agreeing to strike out the amount of the cockades.

A copyhold estate devolved on the defendant^d, when he was an infant of six years of age, whereupon he was admitted (73) and a fine duly assessed. Two years after the de-

^b 1 Inst. 172. a.

^d Evelyn v Chichester, 3 Burr. 1717.

^c Hands v. Slaney, 6 T. R. 578.

(71) See the opinion of Haughton, J. 2 Rol. R. 271. "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant, for no contracts are binding on infants, except such as concern their person."

(72) So in Ford v. Fothergill, 1 Esp. N. P. C. 212. Lord Kenyon, C. J. said, that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant, and the proof of these circumstances lay on the plaintiff.

(73) In the report of this case in Bull. N. P. p. 154, it is stated that the defendant was admitted on coming of age.

fendant (who had continued in possession from the time of his admission) came of age, an *indebitatus assumpsit* was brought for the fine, which the jury found to be reasonable. A question was made for the opinion of the court, whether this action would lie against the defendant, he being a minor at the time of the fine being assessed. The court were of opinion, that the action would well lie; and Yates, J. said, that if assumpsit had been brought against the infant during his minority, he should have thought it maintainable; that an infant might contract for necessaries, *a fortiori*, therefore, for a fine which was due on admission, without which the infant could not have received the rents and profits. But in this case it was clear beyond doubt, for the defendant had confirmed (54) the contract by his enjoyment of the estate two years after he came of age.

Infancy is a good defence to an action of assumpsit on the warranty of a horse*.

Form of the Replication.—A replication in a general form, that the articles provided were necessaries suitable to the estate and degree of the defendant, without stating how, or

e Howlett v. Haswell, 4 Camp. 118.

f Huggins v. Wiseman, Carth. 110.

(74) If goods, not necessaries, are delivered to an infant who after full age ratifies the contract by a promise to pay, he is bound; per Raymond, C. J. Southerton v. Whitlock, London Sittings, Str. 690. But see Stone v. Withipoll, Cro. Eliz. 126, where it was holden, that the simple contract of an infant, not being for necessaries, was merely void, and, consequently, that a promise by his executor to pay in consideration of forbearance was *nudum pactum*. Ashhurst, J. speaking upon this point of subsequent promises by infants in Cockshott v. Bennett, 2 T. R. 766, seems to confine their operation to securities. "A security given by an infant, which is only *voidable*, may be revived by a promise after he comes of age. In such case he is bound in equity and conscience to discharge the debt, though the law could not compel him to do so; but he may waive the privilege of infancy which the law gives him for the purpose of securing him against the impositions of designing persons; and, if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration." It is clear, that if a bond be given by an infant during his minority, for the amount of a simple contract debt, not for necessaries, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently an assumpsit upon the original cause of action cannot be maintained. Tapper v. Davenant, 3 Keb. 798, and Bull. N. P. 155.

in what manner, they were necessities, will be sufficient to bar the plea of infancy. It is however essentially necessary, that it should appear on the face of the replication, that they were necessities *for the infant* (75); for where in assumpsit against an executor for a farrier's bill, the defendant pleaded that the testator was an infant², the plaintiff replied, that the demand was for looking after the infant's horses, and that the work was necessary *for the horses*, on demurrer, the court held that the replication was bad; that it should have been a general replication, that the demand was for necessities for the infant, and the rest should have been left to evidence, where the circumstances of the defendant's health and fortune would be considered: and the court added, that in this case, though the work might be necessary for the horses, yet it did not appear that the horses were necessary for the infant.

It will be proper to remark here, that, on a replication to this effect, viz. that the defendant, after he came of age, confirmed the promise, if the defendant rejoins that he did not, after he came of age, confirm the promise, it is sufficient for the plaintiff to prove the promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed, that a person who contracts is of a proper age to contract until the contrary be shewn. *Borthwick v. Carruthers*, 1 T. R. 649. It must be observed, however, that a replication of a new promise, after the defendant came of age, must be supported by evidence of an *express* promise; payment of part of the plaintiff's demand is not in this case tantamount to evidence of a new promise to pay the remainder, as it is to take a case out of the statute of limitations. Per Kenyon, C. J. in *Thrupp v. Fielder*, 2 Esp. N. P. C. p. 628.

The promise also must be voluntary, and not extorted from the party under the terror of an arrest. Per Lord Alvanley, C. J. *Harmer v. Killing*, 5 Esp. N. P. C. 102.

g *Clowes v. Brooks*, Str. 1101. S. C. by the name of *Brooks v. Crowe*, Andr. 277.

(75) Necessaries for an infant's wife are necessities for him; but if provided for the marriage, he is not chargeable, though she uses them. *Turner v. Trisby*, per Pratt, C. J. London Sittings, E. 5 G. Str. 168. If an infant contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition. *Bacon, Max.* 18.

Where infancy is given in evidence under the general issue, it is competent to the plaintiff to answer it by proof of any matter, which might have been put on the record and pleaded by way of reply to the *plea* of infancy.

Contracts entered into by infants for the maintenance of their trade are not binding on them. This rule has been established for the protection of infants against improvident acts, and that they may not incur losses by trading.

Assumpsit for goods sold^b: *plea*, infancy; replication, that the defendant bought the goods *pro necessario victu et apparatu et ad manutentionem familie sue*: rejoinder, that the defendant kept a mercer's shop, and bought the goods in question to sell again. On demurrer, the court were of opinion, that this buying by the infant, though for the maintenance of his trade, by which he gained his living, should not bind him (76).

So where the plaintiff declared against the defendants being merchants^c, according to the custom of merchants, upon a bill of exchange drawn by the defendants, one of the defendants (77) pleaded infancy. On demurrer the

^b Whittingham v. Hill, Cro. Jac. 494. ^c Williams v. W. H. and R. Harrison, Carth. 160.

(76) So in *Whywall v. Champion*, Str. 1083. it was ruled by Lee, C. J. at the London Sittings, M. 11 Geo. 2. that tobaccoes sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, the defendant appearing to be an infant; for the law would not suffer him to trade, which might be his undoing. So where in an action for work and labour, to which defendant pleaded infancy*, it appeared that the plaintiff was a writing-master, and the defendant a painter and glazier, and the work done by the plaintiff was painting and gilding letters for the defendant's customers; Lord Kenyon, C. J. said, the law would not allow an infant to trade, therefore an action could not be maintained against him for work done in the course of it. I am not aware of any decision at variance with the preceding, except an anonymous case in Buller's Nisi Prius, p. 154. where it is stated, that Mr. Baron Clarke, in an action before him, where the defendant gave his non-age in evidence, it appearing he had been set up in a farm, and bought the sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it into the power of infants to impose upon the rest of the world.

(77) Where an action is brought against partners, and one of them pleads infancy, the plaintiff ought not to enter a *nolle prosequi*.

* *Dilk v. Kelghly*, 2 Esp. N. P. C. 480.

plea was holden good, for the infant was a trader, and the bill was drawn in the course of trade, and not for any necessities. But it has been holden lately, that an infant cannot bind himself even for necessities by his acceptance of a bill of exchange ^k.

It has been holden also, that if an infant is living under the roof of his parent, who provides every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances be deemed necessities ^l. And in one case ^m, where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord Kenyon expressed an opinion that it was the duty of the tradesman, to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not, and unless the tradesman could shew that he had made such inquiry, he was not intitled to recover.

In an action for goods sold to an infant, the issue being necessities, if any part of the articles proved to have been furnished to the defendant, may fall within the description of necessities, the evidence ought to be left to the jury ⁿ.

Infancy is a good bar to an action for money lent, although the infant has expended the money in the purchase of necessities.

In debt upon a single bill, the defendant pleaded his infancy ^o; plaintiff replied, that it was for necessities, viz. part for cloaths and part money lent for necessary support at the university. Rejoinder, that the money was lent defendant to spend at pleasure, traversing that it was lent for necessities, and issue thereupon was found for plaintiff, who had judgment in C. B. which was reversed on error in

^k Williamson v. Watts, 1 Camp. N. P. C. 552.

⁵¹ G. 3. Sir J. Mansfield, C. J. S. P. MS.

^l Per Gould, J. Bainbridge v. Pickering, 9 Bl. R. 1395. per Bayley, J. Borriusale v. Greville, Somerset Sum. Ass. 1810. MS. Deale v. Leave, C. B. London Sittings after H. T.

^m Ford v. Fothergill, Peake's N. P. C. 229. 1 Esp. N. P. C. 211. S. C.

ⁿ Maddox v. Miller, 1 M. and S. 738.

^o Earle v. Peale, Salk. 346.

qui as to the infant, and proceed against the others, for if he does, he will be nonsuited. The proper method in this case is to discontinue the first action, and proceed *de novo* against the other partners. Jaffray v. Fairbairn and others, 5 Esp. N. P. C. 47. Per Lord Ellenborough, C. J. recognizing Chandler v. Parkes, 3 Esp. N. P. C. 76. per Kenyon, C. J. S. P.

B. R.; and Parker, C. J. said, that an infant might buy necessities, but he could not borrow money to buy, for he might misapply the money, and therefore the law would not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it was his providing, and his laying out so much money in necessities for him (78).

If the action against an infant be grounded on a contract, the plaintiff cannot convert it into a tort, ~~so as to charge the~~ infant.

“ If one deliver goods to an infant on a contract^o, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant.” Hence, whatever be the form of the action which is commenced, if the act done by the infant is the foundation of an assumpsit, the plea of infancy will be a good bar: “as where an infant hired a mare of the plaintiff to go a journey, in the course of which the mare was strangled^d. The plaintiff having declared against the infant for

p 1 Sid. 129. Mauby v. Scott.

q Jennings v. Randall, 8 T. R. 335.

(78) In *Darby v. Boucher*, Salk. 279. a question was made, whether in the case of money lent to an infant, who employs it in paying for necessities, the infant was liable, and Holt, C. J. was of opinion, that he was not; for it was upon the lending that the contract must arise, and after that time there could not be any contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessities would not by matter *ex post facto* entitle the plaintiff to an action; for, as was observed by the court in *Earle v. Peale*, 10 Mod. 67. the law does not recognize any contracts except such as are good or bad at the time when they were made, and their nature cannot be altered by any subsequent contingency. So in *Probart v. Knouth*, 2 Esp. N. P. C. 472. n. where, to an action for money lent, the defence was infancy; Buller, J. would not permit the plaintiff to give in evidence, that the money lent was laid out in the purchase of necessities. But it is otherwise in equity; for if one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, in equity the infant is liable, for there the lender of the money stands in the place of the person paid, viz. the creditor for necessities, and shall recover in equity as the other should have done at law. Per Cur. *Marlow v. Pinfild*, 1 P. Wms. 558. The same rule of equity holds with respect to money lent to a *feme covert*, and afterwards applied to her use for necessities. See post, tit. *Baron and Feme*, s. 4.

this injury in tort, he pleaded infancy, which on demurrer was holden a good plea; and Lord Kenyon, C. J. said, that if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield, indeed, frequently said, that this protection was to be used as a shield and not as a sword; therefore if an infant commit ~~an~~ ^{an} ~~act~~ ^{act} God forbid, that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person, who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract; and the words "wrongfully, injuriously, and maliciously," introduced into the declaration cannot vary this case (79).

A single bill^r given by an infant for the amount of necessities is binding on him, but a bond in double the amount^s is not.

So an account stated of monies due for necessities will not lie against an infant^t, the law not giving an infant credit for accurate computation, nor can he agree to any such account.

A warrant of attorney given by an infant is absolutely void^u, and the court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion; for such acts of an infant as are only voidable

^r Russell v. Lee, 1 Lev. 86, 87.

^s Ayliff v. Archdale, Cro. Eliz. 938.

See also 1 Inst. 172. a.

^t 2 Roll. Rep. 271. and Trueman v. Hurst, 1 T. R. 40.

^u Saunderson v. Marr, 1 H. Bl. 75.

(79) As in the cases of contract, where the law has protected the infant against his liability, he cannot be prejudiced by the form of action in which he is sued; so in cases *ex delicto*, where he is responsible, he cannot derive any advantage from it.

In *Bristow v. Eastman*, 1 Esp. N. P. C. 172. Kenyon, C. J. was of opinion, that money had and received would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action for money had and received was in form an action *ex contractu*, yet in this case it was in substance an action *ex delicto*; that if trover had been brought for the property embezzled, infancy would not have been a defence; and as the object of the action for money had and received was the same, he thought the same rule of law ought to apply, and therefore that infancy ought not to be a bar.

are allowed in equity to be confirmed, but not such as are actually void.

An infant cannot be bound by a submission to arbitration².

4. Payment.

4. *Payment*.—To an action of *assumpsit* the defendant may plead matter of discharge *ex post facto*, as payment before action brought, but this defence may be and generally is given in evidence under the general issue.

Indebitatus assumpsit for goods sold¹: plea, payment; special demurrer, because the plea amounted to the general issue; but *per Cur.* it admits at one time a good cause of action (80) in the plaintiff, and excuses it by matter *ex post facto*, and therefore is a good plea.

A person who is indebted to another on several accounts, may, at the time of payment, apply the money to which ever account he thinks proper; and his election so to do may either be expressed, or may be inferred from the circumstances of the transaction²; but if the party paying does not make such election, the receiver may apply it as he pleases³ (81).

The mere production of a bill of exchange from the custody of the acceptor is not presumptive evidence of payment, unless it be shewn that the bill was once in circulation after being accepted⁴. Nor is payment to be presumed from a receipt indorsed on the bill, unless it can be shewn

x Anon. B. R. Hil. 55 Geo. 3.

y Vanhatton v. Morse, Ld. Raym. 787.

z Newmarch v. Clay, 14 East, 239.

Agreed per cur. Peters v. Anderson, 5 Taunt. 596.

a Bowes v. Lucas, B. R. M. 11 G. 2.

Andr. 35 Goddard v. Cox, Str. 1194.

See 2 Vern. 607. S. P. per Ld. Cowp.

Ch. and Peters v. Anderson, 5 Taunt. 596.

b Pfiel v. Vanbatenberg, 2 Camp. N. P. C. 429.

(80) "It is generally true, that a plea, which admits that there was once a cause of action, does not amount to the general issue." *Per Holt, C. J.* in *Brown v. Cornish*, Ld. Raym. 217.

In pleading a plea of payment, the defendant ought to plead *actio non*, and not *onerari non debet*, for he allows the promise to be a good promise, but avoids it by matter of discharge *ex post facto*; *per Holt, C. J.* *ibid.*

(81) The defendant owed money on two bonds, and paid money on account, but gave no directions to which he would have it applied; and upon a case reserved, it was determined, that the plaintiff had the election. *Bloss v. Cutting*, cited in 2 Str. 1194.

that the receipt is in the handwriting of a person entitled to demand payment^c.

5. Release.

5. *Release*.—Defendant may plead a release after promise, and before action brought, specially (82), or give it in evidence^d under the general issue. The usual replication to a plea of release is *non est factum* (83). *

A release, upon performance of the promise in part^e, *quoad hoc*, will not discharge the promise for the residue.

If after the last continuance the plaintiff give the defendant a release, he may plead it in bar^f; such plea is called a plea *puis darrein continuance*: as it is pleaded sometimes at the assizes, the following form may be useful:

“ And now at this day, to wit, on the _____ day of _____
 “ _____ in the _____ year of the reign of our
 “ Sovereign Lord George the Third by the grace of God,
 “ &c. before A. B. and C. D., justices of our Lord the
 “ now King, appointed to take the assizes in and for the
 “ county of G. aforesaid, at _____ in the county of
 “ G. aforesaid, comes the said H. J., by J. S. his counsel,
 “ and says that the said E. F. ought not ~~further~~ (84) to
 “ maintain his action against the said H. J., because he says
 “ that after the making the said several supposed promises
 “ and undertakings in the said declaration mentioned, and
 “ after the last continuance of the aforesaid plea, that is,

^c S. C.

^d *Miller v. Aris*, ante, p. 115. *Hawley v. Peacock*, 2 Camp. N. P. C. 558. S. P.

^e 2 Roll. Abr. 413. l. 2 *adjudged*.

^f Bull. N. P. 309

(82) See the form, Clerk's Assist. p. 257, 258. 2 Rich. P. B. R. p. 43. third edition.

(83) 2 Rich. Pr. B. R. p. 44.

(84) “ This seems to be the proper way of pleading a collateral thing, which happens after the action brought; for by this it admits that the action was well brought, but that the plaintiff by reason of the new matter ought not to proceed further in it.” *Camden v. Baker*, Lutw. 1143. “ Since the case of *Evans v. Prosser*, 1 T. R. 136. it may be considered as a settled rule of pleading, that no matter of defence arising after action brought can properly be pleaded in bar of the action generally.” Per Lord Ellenborough, C. J. in *Le Bret v. Papillon*, 4 East's R. 507.

" after the (85) day of last past, from which
 " day until the day of in Mich. Term next
 " (unless the justices of our Lord the King assized to
 " hold the assizes of our Lord the King in and for the
 " county of G. should first come on the day of
 " at in the said county of G.) the action afore-
 " said is continued, to wit, on, &c. (86) at, &c. the said
 " E. F. by his deed, dated, &c. did release," and so shew the
 particular matter, and conclude, " And this he is ready to
 " verify, wherefore he prays judgment if the said E. F.
 " ought *further* to maintain this action against him, &c."

It is the constant experience at the assizes to put the party to verify a plea *pais darrein continuance*^g, before it is allowed; and if the party does not give some evidence of the truth of it, the judge will reject it, and go on with the cause.

The same certainty is required in this, as in other pleas.^h

A plea *pais darrein continuance* may be pleaded at *nisi prius*, although there has been time to plead it in bank since the last continuanceⁱ. If it be verified by an affidavit which refers to the plea, and the plea is in the cause, the affidavit is sufficient, though not specially entitled in the cause^k.

If the jury be not taken at the day of *Nisi Prius*, a release is pleadable after the last continuance at the day in bank^l, although it be not offered at *Nisi Prius*; but otherwise it is, if the jury be taken.

6. Statutes,

1. Of Limitations.

2. Of Set-Off.

1. *Statute of Limitations*.—By stat. 21 Jac. 1. c. 16. § 3. all actions upon the case (other than slander) shall be commenced and sued within six years next after the cause of such actions, and not after.

g Per Cur. in *Martin v. Wyvil*, Str. 493. i *Prince v. Nicholson*, 5 Taunt. 333.
 h Doct. Pl. 297. k Ib.
 l Doct. Pl. 300.

(85) The day of the return of the *venire facias*.

(86) The defendant must allege precisely the very day, time, and place. Per Cur. Yelv. 141.

Advantage must be taken of this statute by pleading it^m, (87) although it should appear on the face of the declaration that the cause of action did not arise within six years before the commencement of the action; and the defendant will not be permitted to give it in evidence on the general issue, *non assumpsit*.

There are two forms in which this statute is usually pleaded:

1. *That the defendant did not at any time within six years next before the commencement of the plaintiff's action, undertake or promise, &c.*

2. *That the cause or causes (if more than one) of action mentioned in the declaration, did not accrue at any time within six years next before the commencement of the plaintiff's action, &c.*

The first form is proper in actions of *indebitatus assumpsit* for goods sold and delivered, money lent, and the like, where the consideration is executed.

In an *indebitatus assumpsit*^a, on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*; the plaintiff demurred, on the ground that nothing was due until demand, and therefore defendant should have pleaded *non assumpsit infra sex annos* after demand, or that no de-

^a Puckle v. Moor, 1 Vent. 191. Lee v. Collins v. Benning, 12 Mod. 444. v. Rogers, 1 Lev. 110.

(87) Different reasons are assigned for this which seems to be an exception to the general rule, that where it is required by statute, that an action shall be commenced within a limited time, it is incumbent on the plaintiff to prove that he has complied with the terms of the statute. In an anonymous case in Sulk. p. 278. Holt, C. J. said, that the statute of limitations could not be given in evidence on *non assumpsit*, because that plea spoke of a time past, and related to the time of making the promise, but that on *nil debet* it might; and in Draper v. Glassop (Ld. Raym. 153.) he expressed the same opinion.

In Gould v. Johnson (Ld. Raym. 838.) it was said by the court, that the statute ought to be pleaded, because an original might have been sued out within six years, and therefore the defendant should plead the statute, to the end that the plaintiff might have an opportunity to reply such matter. A different reason is assigned by Mr. Serjeant Williams, in an elaborate note on this subject in the second vol. of his edition of Saunders, p. 63 b. and 63 c. to which, on account of its length, I must refer the reader.

mand was made within six years: But *per Cur.* If the promise were for a collateral thing, which would not create any debt until demand, it might be so; but here, it is an *indebitatus assumpsit*, which shews a debt at the time of the promise, therefore the plea is good.

The second form, viz. that the cause of action did not accrue within six years, may be adopted with safety in all cases, but is more peculiarly applicable to the cases of actions brought for breach of promises founded on collateral and executory considerations, in which cases the first form would be improper, as will appear from the following case:

The declaration stated, that, in consideration that the plaintiff would receive A. and B. into his house as guests, and diet them^o, the defendant promised, &c. Plea, *non assumpsit infra sex annos*, to which the plaintiff demurred: judgment for the plaintiff in the Common Pleas: on error in B. R. it was agreed by that court that the plea was ill: for this being an executory collateral promise, the defendant cannot plead *non assumpsit infra sex annos*, but should have pleaded *causa actionis non accrevit infra sex annos* for, if the cause of action accrued within six years, it was immaterial when the promise was made.

The plea of the statute of limitations may be pleaded to an action brought on a bill of exchange, because it is not a specialty^p; and to an action brought by an attorney for his fees, because the fees are not of record. A promissory note payable on demand, is payable immediately; and the statute of limitations runs from the date of the note, and not from the time of demand^r.

To the plea of *non assumpsit infra sex annos* the plaintiff may tender an issue^s, that defendant did promise within six years, and this issue will be supported by evidence of an express promise (88) made by defendant within six years before action brought: for it has been holden, that this statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is

^o *Gould v. Jackson*, 1d Raym. 838. ^r *Christie v. Fossick*, C. B. London and S. Salk. 498. ^s *Sittings after W. 1. 52 G. 3* Sir J. Marshall, C. J. M. 6.
^p *Renew v. Axton*, Carth. 3. ^s *Dickson v. Thomson*, 2 Show. 196.
^q *Oliver v. Thomas*, 3 Lev. 367.

(88) "Doubtless an express promise will revive the debt, though it were twenty years after." *Per Holt, C. J.* in *Hylking v. Hastings*, Lord Raym. 389.

capable of being removed by a subsequent promise on the part of the defendant within the limited time.

Not only an express promise, but a mere acknowledgment of the debt, as existing, will be sufficient to support this issue.

One of the strongest cases on this subject is that of *Bryan v. Horseman*, 4 East's R. 599. where in assumpsit for wheat sold and delivered, the defendant pleaded the statute of limitations. At the trial, the plaintiff called the sheriff's officer, who proved that the defendant, on being arrested, said, "I do not consider myself as owing Mr. Bryan a farthing, it being more than six years since I contracted. *I have had the wheat I acknowledge, and I have paid some part of it, and 26l. remain due.*" (89) On the part of the defendant it was objected, that these expressions amounted to no more than what he had stated upon record in his plea,

(89) "The slightest acknowledgment has been holden sufficient, as saying, 'Prove your debt, and I will pay you *,' 'I am ready to account, but nothing is due,' and much slighter acknowledgments than these will take a debt out of the statute." Per Lord Mansfield, C. J. in *Trueman v. Fenton*, Cowp. 548. See also *Lloyd v. Maund*, 2 T. R. 762. where the same doctrine was laid down by Buller, J. So, in the following case, the defendant meeting the plaintiff, said to him, "What an extravagant bill you have delivered me!" Lord Kenyon, C. J. held this a sufficient acknowledgment of some money being due†. In *Clark v. Bradshaw and Cogan*, 3 Esp. N. P. C. 155, 7, where the defendant, Bradshaw, saying, "that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time the debt accrued;" Lord Kenyon, C. J. held it sufficient to take the case out of the statute. It must however amount to an acknowledgment of a debt; for where an action was brought by an executor against defendant for money had and received, it was proved that defendant, said, "I acknowledge the receipt of the money, but the testatrix gave it me," Clive, Baron, directed the jury to find for the defendant, observing, that such an acknowledgment could not amount to a promise to pay, when he insisted that he was entitled to retain. *Owen v. Wolley*, Bull. N. P. 148. In an action against a husband for goods supplied to his wife, for her accommodation, while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. N. P. C. 394.

* Per Holt, C. J. in *Hayling v. Hastings*, 1 Salk. 99.

† *Lawrence v. Worrall, Peake*, N. P. C. 93.

which confessed the existence of the debt, but avoided it by alleging the lapse of time. Lord Ellenborough, C. J. thought, that, according to the authorities, such an acknowledgment of the existence of the debt must be deemed sufficient to take the case out of the statute, though, if the matter had been *res integra*, the point might have admitted of doubt, and accordingly by his direction a verdict passed for the plaintiff.

On a motion for a new trial, it was urged by the counsel for the defendant, that, although where there was a simple acknowledgment of the debt as then existing, a promise to pay it might be implied from the reason and justice of the case, and the presumed intention of the party making the promise, yet that implication or presumption might be rebutted, and could not apply to an acknowledgment accompanied with a positive declaration, that the party did not consider himself bound in law to pay the debt; otherwise the plea of *non assumpsit infra sex annos*, which was an acknowledgment of the antecedent debt, might be strained into a promise. But if an acknowledgment and avoidance, when put in the form of a plea on the record, was a good defence, it could not overset the plea, when tendered as evidence, and that, in this case, the presumption of a new promise, which might arise from the acknowledgment, if it stood alone, was rebutted by the concomitant avoidance. The court after some hesitation, granted a rule to shew cause; but when the counsel were to have shewn cause on a subsequent day, Lord Ellenborough, C. J. said, that they had looked into all the authorities, and that, whatever their opinion upon the statute might have been, had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it, in conformity with which, they thought themselves bound to hold, that, what was said by the defendant, was a sufficient acknowledgment of the pre-existing debt to create an assumpsit, so as to take the case out of the statute.

The defendant had stated to the court^t, in an affidavit for leave to plead the statute of limitations, that "since the bill of exchange (on which the action was brought) became due (which was more than six years before) no demand for payment had been made on him," this was deemed sufficient to be left to the jury as an acknowledgment, and the jury having found a verdict for plaintiff, the court refused to grant

^t Rucker v. Hanuay, B. R. T. 29 C. 2. 4 East's R. 604. n.

a new trial. So where a letter was written by defendant to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly denying nor admitting the debt, it was holden, that such letter ought to have been left to the jury to consider, whether it amounted to an acknowledgment of the debt, so as to take it out of the statute (90).

In *Whitcomb v. Whiting*, Doug. 651. an acknowledgment by one of several makers of a joint and several promissory note was holden sufficient to take it out of the statute against the others, and that such an acknowledgment might be given in evidence in a separate action against any of the others. So where one of two makers of a joint and several promissory note became a bankrupt, and the payee received several dividends under the commission on account of the note, and an action having been brought (within six years after the receipt of the last dividend) against the other maker for the remainder of the money due on the note, it was adjudged, that the payment of the dividends was such an acknowledgment of the debt as took the case out of the statute. So in an action against A. on the joint and several promissory note of himself and B.; it was holden that a letter written by A. to B. "desiring him to settle the money" took the case out of the statute.

In *Yea v. Fouraker*, Bull. N. P. 149. in assumpsit on a promissory note, the defendant pleaded *non assumpsit infra sex annos*: on the trial it appeared, that the defendant was surety in the note for J. S. and that six years were elapsed since the note was given, but that, upon a demand within six years, the defendant said, "you know I had not any of the money myself, but I am willing to pay half of it." The judge was of opinion, that this promise took it out of the statute, but the jury found for the defendant: and on a motion for a new trial, the court held clearly that the opinion of the judge was right; that this promise was sufficient, and granted a new trial. According to the report of this case in 2 Burr. 1099. the court held, "that an acknowledgment of the debt after the commencement of the action would take it out of the statute of limitations."

u *Lloyd v. Maund*, 2 T. R. 760.
x *Jackson v. Fairbank*, 2 H. Bl. 340.

y *Halliday v. Ward*, 3 Camp. N. P. C. 32.

Where there are mutual accounts* (not merchants' accounts), for any item of which credit has been given within six years, this is evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations (91).

In *Hyleing v. Hastings*, *Ld. Raym.* 422, "the court were of opinion, that an acknowledgment of the debt within six years of the action was good evidence of a new promise, upon *non assumpsit infra sex annos*, for a jury to find a verdict for plaintiff, but not matter upon which, if found specially, the court would give judgment for the plaintiff. And *Rokeby, J.* compared it to the case of trover and conversion, where a demand and refusal has been holden evidence of a conversion, but not a conversion." From the language, however, of more modern decisions, it must be inferred, that the mere finding by the jury of an acknowledgment of the debt within six years of action brought will be sufficient, and that, from such acknowledgment, a promise to pay will be raised by *implication* of law.

Plaintiff declared as executor on a promise to the testator*, defendant pleaded *non assumpsit infra sex annos*; and upon the trial it appeared, that there was a new promise made within six years, but it was made to the plaintiff and not to the testator. Per cur. he should have declared accordingly.

And in *Sarell v. Wine*, 3 East's R. 409. in the case of an action brought by an administrator on promises to the intestate, where the evidence was an acknowledgment to the administrator within six years, it was holden insufficient on the authority of the preceding case.

So where an action was brought by an executor on pro-

z *Catling v. Skoulding*, 6 T. R. 199. a *Deane v. Crane*, *Salk.* 28.

(91) But where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years, shall not draw after it those that are of a longer standing. Per *Denison, J.* in *Cotes v. Harris*, *Bull. N. P.* 149. And in this case the same learned judge held, that the clause in the statute about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons. And in *Webber v. Tivill*, 2 *Saund.* 124. it was holden, that this clause extended only to accounts current between merchants, and not to accounts stated between them.

mises made to the testator^b, the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff replied a subsequent promise to himself; the replication was adjudged a departure in pleading, and therefore bad.

Replication.—To the plea of the statute of limitations, the plaintiff may reply a *latitat*^c (without shewing a bill of Middlesex) or a *capias*^d, (without shewing an original) sued out before the expiration of the limited time, with an intention to declare in the action then pending, and that such writ was returned^e, and regularly continued^f to the com-

b Hickman v. Walker, Willes, 27.

c Hollister v. Coulson, Str. 550

d Karver v. James, Willes, 255. Leader v. Moxon, 2 Bl. R. 925. S. P. per Cur.

e Karver v. James, Willes' R. 258, 9. Per 3 Judges, Brown v. Babington, Lord Raym. 883. (92).

f Rudd v. Berkenhead, Carth. 144. and Salk. 420.

(92) In this case, Holt, C. J. said, that it was a fatal fault that the plaintiff did not shew that the original writ was ever returned. And in *Atwood v. Burr*, 7 Mod. 5. he said, "if one were to continue a *latitat* for several years, he must get the first returned, upon which return the continuances are made, though in fact he never takes out another writ; but *there must be a return of the first writ*." The language of Holt, C. J. in the preceding cases, was adopted by Kenyon, C. J. delivering the opinion of the court in *Harris v. Woolford*, 6 T. R. 618, 619. See also *Thistlewood v. Cracroft*, 1 Marsh. 497.

In *Kinsey v. Heyward*, C. B. 1 Lutw. 256. and Lord Raym. 432. a question arose, whether an action of assumpsit in one county could be considered as a continuation of an action commenced by a writ of *clausum fregit* sued out in another county within the limited time, so as to prevent the statute of limitations attaching: Treby, C. J. Powell and Nevill, Justices, were of opinion that it was. Blencowe, J. cont.—A writ of error having been brought in B. R., the case was there determined on a different ground, viz. that admitting the assumpsit to be a continuance of the *clausum fregit*, which it was difficult to maintain, yet that writ had not been returned, nor were the continuances stated. This judgment was affirmed on error in the House of Lords. It is observable that in *Brown v. Babington*, Lord Raym. 882. Holt, C. J. agreed in opinion with Blencowe, J. "that the assumpsit could not be considered as a continuance of the action commenced by *clausum fregit*, and said, that he imagined that, after the reversal of the judgment of *Kinsey v. Heyward* was affirmed in parliament, this point would never have been moved again." But Powell, J. retained his former opinion, that the suing of the *clausum fregit* would avoid the statute as well as a *latitat*, alleging that a *clausum fregit* was the ancient process of the Court of Common Pleas, and very useful to the subject in saving the fine due upon the original.

commencement of the action. The continuances must be stated formally in the plea, for a *taliter processum est*, before declaration, is not sufficient; and the continuances must appear on the record to be continuances of the same writ or process which was originally sued out; for where the replication alleged that a bill of Middlesex was sued out^g, which was continued to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege for the same cause of action, the replication was holden bad on demurrer; for the attachment of privilege was a writ of a different nature from a bill of Middlesex, not bearing any analogy to it; and consequently was not a continuance of the former suit.

If a *latitat* is sued out after the expiration of the six years^h, but bearing *teste* before, and the plaintiff in his replication state the *latitat* to have been sued out on the day on which it bears *teste*, the defendant, in his rejoinder, may shew the real day on which the *latitat* was sued out, and aver that he did not promise within six years next before that day.

If an action be commenced in an inferior courtⁱ, and then removed by *habeas corpus* into the King's Bench, where the plaintiff declares *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply the suit below, and shew that to have been commenced within six years of the cause of action.

And in *Story v. Atkins*, 2 Str. 719, where the declaration in the inferior court was *indebitatus assumpsit* for money due, and the declaration in the superior court was a special assumpsit on a promissory note, yet the plaintiff in his replication having averred, that the declaration in the superior court was for the same cause of action as that for which plaintiff had levied his plaint below, it was holden sufficient to bar defendant's plea of the statute of limitations.

The replication must state that the *cause of action* accrued within six years next before the suing forth of the writ; for, where in assumpsit, by an executor on promises to the testator, the defendant pleaded the statute, and the plaintiff replied, that the writ was sued out on such a day^k, and within six years before the suing out thereof, letters testamentary were granted to the plaintiff; on special demurrer, assigning for cause, that the plaintiff had not alleged

g *Smith v. Bower*, 3 T. R. 662.

h *Johnson v. Smith*, 2 Burr. 950.

i *Bevin v. Chapman*, 1 Sid. 228. and *Matthews v. Phillips*, 8olk. 424. S. P.

k *Hickman v. Walker*, Willes, 27.

positively that the *cause of action* accrued within six years before the *spring forth* of the writ, the replication was holden bad; the court observing, that the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; that the proving the will did not give any new cause of action, and consequently the time, when it was done, was immaterial.

So where to *assumpsit* brought by the assignee of a bankrupt, defendant pleaded the statute of limitations; the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years next before the assignment; on demurrer, the replication was holden bad; the court observing, that the statute would be defeated as to all simple contracts, if an assignment, at the end of five years and a half, was to set all at large again.

By stat. 21 Jac. 1. c. 16. s. 4. it is enacted, "that if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be outlawed, and the outlawry reversed; the plaintiff, his heirs, executors, or administrators, may commence a new action or suit from time to time *within a year*, after such judgment given or outlawry reversed."

It has been said, that within the equity of the preceding section, the courts have permitted an executor or administrator *within a year* (93) after the death of the testator or

1 Gray v. Mendez, 1 Str. 556.

(93) I am not aware of any case in which this point has been *expressly* decided, or in which it has been holden, that an executor or administrator *must* bring his action within a year. In Buller's N. P. p. 150. is the following position: "If an executor take out proper process *within a year* after the death of his testator, if the six years were not lapsed before the death of the testator, though they be lapsed within that year, yet it will be sufficient to take it out of the third section of the statute of limitations by the equity of the fourth section." The authority cited for this position is Cawer v. James, probably the same case as is reported in Willes, 255. by the name of Karver v. James; but in Willes's Report, the position is laid down by Buller seems rather to have been admitted, than expressly determined. In like manner in Wilcocks v. Huggins, Stf. 907. and Fitzg. 170, 289. it seems to have been taken for granted. From the language, however, of Lee, J. in the last-mentioned case, it may be inferred that at that time no fixed period, within which the executor or administrator might bring the

intestate, to renew a suit commenced by the testator or intestate.

To an action of *indebitatus assumpsit* brought by an ex-

m Leadbeter v. Markland, 3 Bl. Rep. 1131.

action, had been established. His words are, "In the contingency that has happened, the statute does not limit any time for the executor to bring his action; but there is a clause that provides (where a judgment is reversed after the six years) one year after the reversal for the plaintiff to bring a new action, which may be a direction with regard to the reasonableness of the time to be allowed an executor or administrator in the present contingency." It is observable also, that in *Wilcox v. Huggins*, Fitzg. 171. a case (*Lethbridge v. Chapman*) was cited, where an administrator brought his action fourteen months after the intestate's death, and recovered: and in *Wilcox v. Huggins* (where the action was brought by the executor of an executor in right of the first testator more than four years after the death of the first executor) it was admitted by the court, that if the second executor had been retarded by suits about the will or administration, it would have altered the case, because then the neglect would have been accounted for. Perhaps the only rule that can be laid down with safety is, that the executor or administrator must bring his action within a reasonable time. This rule receives some sanction from the following observations of the judges in *Wilcox v. Huggins*, Fitzg. 290. Raymond, C. J., "It might be too harsh a construction to say, that the debt becomes irrecoverable by an abatement of the action, after the six years elapsed, by the plaintiff's death; but then the executor, to bring his case within the equity of the statute, must make a recent prosecution, as to which, the clause in the statute that provides a year after the reversal of a judgment, &c. may be a good direction." Page, Justice: "Such a recent prosecution is to be made as will shew the party came as early as he might. If there had been a contest about the will or the right of administration, that should have been pleaded in excuse of the delay." Probyn, J. "Nothing hath been disclosed to shew why the action was not brought sooner. If a reasonable cause had been shewn, it might bring the action within the notion of a recent prosecution, though it had been brought after the year." Lee, J. "I think it should be in the nature of Journey's Accompts, which is a taking up and pursuing the old action in a reasonable time, which is to be discussed by the discretion of the justices, 6 Co. Spencer's case; and, by the same rule, I think what is or is not a recent prosecution, in a case of this nature, is to be determined by the discretion of the court from the circumstances of the case, but generally the year in the stat. is a good direction."

cutor for business done by his testator, the defendant pleaded the statute of limitations. Replication, an attachment of privilege sued out returnable in eight days of the purification. Special demurrer, because the attachment was alleged to have been returnable on a general return day, instead of a day certain; the court overruled the demurrer, observing, that the writ, though informal, was sufficient to bar the statute, for if the cause had proceeded, and plaintiff had recovered, and afterwards judgment had been reversed or arrested for this irregularity, the plaintiff, by the 4th section, would have had a year's time to proceed in a new action which shewed the spirit of the statute to be, that a suit actually begun, however informally or irregularly, was sufficient to bar the statute (94).

Exceptions in Case of Infancy, &c.—By the 7th section of stat. 21 Jac. 1. c. 16. "If any person, entitled to such
" action of trespass, detinue, trover, replevin, actions of
" account, debt, trespass for assault, menace, battery,
" wounding, or imprisonment, actions upon the case for
" words, shall be, at the time of such cause of action
" accrued, within the age of 21 years, *feme covert*, non
" *compos mentis*, imprisoned, or beyond the seas, such per-
" son shall be at liberty to bring the same actions within
" such times as are before limited after their being of full
" age, discoverd, of sane memory, at large, and returned
" from beyond the seas."

An action of assumpsit, although it is not expressly mentioned, is within the equity of the preceding clause^a.

To a plea of the statute of limitations^o, the plaintiff replied, that he was resident in foreign parts out of the kingdom of England, viz. at Glasgow in Scotland: on demurrer,

m Leadbeter v. Markland, 2 Bl. Rep. 1131.

and Rochtschilt v. Leibman, 2 Str. 836. and Fitzgib. 87.

n Chandler v. Velett, 2 Saund. 120. o King v. Walker, Bl. R. 286.

(94) So where the plaintiff had levied a plaint, and declared in an inferior court, and the cause had been removed by *habeas corpus* into the Court of King's Bench, where the plaintiff declared *de novo*: an objection having been made to the declaration in the inferior court, Raymond, C. J. said, that, although the declaration in the court below should be ill, yet if the plaint were regular, it was sufficient to prevent the operation of the statute. Story v. Atkins, 9 Str. 725.

this replication was holden bad, because the plaintiff must be beyond the seas (95).

If the plaintiff is a foreigner, living beyond the sea at the time when the cause of action accrues, and doth not come to England for 50 years, he still has six years after his coming to England to bring an action of assumpsit; and if he never comes to England, his right of action is not barred either against him or his executors or administrators after his death. Hence a replication^p (to a plea of the statute of limitations) that the plaintiff was beyond sea at the time when the cause of action accrued, and that he hath ever since been and still is abroad, was holden good, on demurrer.

If the plaintiff be in England when the cause of action accrues^q, the time of limitation begins to run, and a subsequent departure from the kingdom and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time (96).^r So if there are several partners^r, and some are in England at the time when the cause of action accrues, and others beyond the seas, the action must be brought within six years next after the cause of action accrues, notwithstanding the absence of the partners beyond the seas.

Before the statute of Ann, hereinafter mentioned, it was holden, that the exception in the 7th section of the stat. 21 Jac. 1. c. 16. as to persons being beyond the seas, extended only to the case of plaintiffs so absent^s, and not to that of defendants; 1st. because plaintiffs only are mentioned in the statute of James; and 2dly, because the plaintiffs might have filed an original, and outlawed the debtor, which would

p Strithorst v. Gramc, 2 Bl. R. 723.

s Hall v. Wybourn, Carth. 136. and

q Smith v. Hill, 1 Wils. 134.

Chcvely v. Bond, Carth. 226.

r Perry and others v. Jackson, 4 T. R. 516.

(95) It was holden by Holt, C. J. upon consideration, that Dublin, or any place in Ireland, was beyond the sea, within the meaning of this statute. Anon. 1 Show. 91.

(96) So when a disability is once removed, and the statute has begun to run, no subsequent disability will stop the running. See the opinion of Lord Kenyon, C. J. in *Doe dem. Duroure v. Jones*, 4 T. R. 311. where that learned judge speaks of the uniform construction of *all* the statutes of limitation in this respect. See also *Gray v. Mendez*, Str. 556. and *Doe d. Griggs v. Shaen*, B. R. M. 28 G. 3. MS. S. P.

have prevented the bar of the statute. But now, by stat. 4. Ann. c. 16. s. 19, "If any person, against whom there is any cause of action for seamen's wages, or of action upon the case, shall be, at the time of such cause of action accrued, beyond the seas, the person entitled to the action may bring the same against such person after his return from beyond the seas, within the time limited by the 21. Jac. 1. c. 16."

To a plea of the statute it is sufficient to reply that the defendant was in the East Indies, at the time the cause of action accrued, and that plaintiff commenced his suit against the defendant within six years next after his return to this kingdom; and it is no answer to this replication to say, that the defendant remained more than six years in India after the cause of action accrued there, and within the jurisdiction of the supreme court at Calcutta in that country.

2. *Statute of Set-off.*—At common law, if the plaintiff was indebted to the defendant, in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt, and consequently the defendant was driven to a cross action. To obviate this inconvenience and to prevent circuity of action, or a bill in equity, it was enacted by stat. 2 G. 2. c. 22 s. 13. (made perpetual by stat. 8 G. 2. c. 24. s. 4.) "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence on such general issue." And by stat. 8 G. 2. c. 24. s. 5, it was enacted and declared, "that by virtue of the preceding clause, mutual debts might be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts were deemed, in law to

* Several other actions are mentioned in Williams v. Jones, 13 East, 499. in this statute.

“ be of a different nature; unless in cases where either of
 “ the said debts shall accrue by reason of a penalty con-
 “ tained in any bond or specialty; and in all cases, where
 “ either the debt for which the action shall be brought, or
 “ the debt intended to be set against the same shall accrue,
 “ by reason of any such penalty, the debt intended to be
 “ set-off shall be pleaded in bar, in which plea shall be shown
 “ how much is justly due on either side; and in case the
 “ plaintiff shall recover in any such action or suit, judgment
 “ shall be entered for no more than shall appear to be justly
 “ due to the plaintiff, after one debt being set against the
 “ other as aforesaid.”

Where an equal debt is set against the plaintiff's demand^x, the defendant may conclude his plea with a prayer of judgment, if plaintiff should maintain his action; for an equal debt is made a good bar by the statute (2 G. 2. c. 22.), and the defendant is not under any necessity of praying a different judgment than if he had pleaded a release; for both equally destroy the plaintiff's action. Adjudged on general demurrer (97).

Assumpsit on a promissory note for 16*l.* 10*s.* payable a month after date; defendant pleaded that plaintiff owed him as much money as he owed plaintiff on the note, to wit, 16*l.* 10*s.* for goods sold. On general demurrer it was objected, that the note was for 16*l.* 10*s.* payable in one month after date, and, therefore, must carry interest from the end of the month; that the whole debt, pleaded by the defendant in bar, amounts but to 16*l.* 10*s.* which is a less sum than appears to be due on the note, including the interest, and consequently the plea must be ill. Lord Hardwicke, C. J. “ The 16*l.* 10*s.* mentioned in defendant's plea, comes under a videlicet, and is therefore immaterial, and not traversable; the only substantial part of the plea is, that plaintiff owes defendant for goods sold, &c. as much as defendant owed him upon the note: and if plaintiff had taken issue on this, the whole debts on both sides would have come into consideration. As it is,

^x Cook v. Dixon, E. 8 G. 2 B. R. MSS. and shortly stated in Bull. N. F. 179

^y Cook v. Dixon, MSS.

(97) Where the defendant owes the plaintiff a greater sum than is due from the plaintiff to him, there the defendant, in order to entitle himself to deduct his debt, must pray that so much may be deducted from the plaintiff's demand. Per Cur. in Cook v. Dixon, B. R. E. 8 G. 2 MSS.

the addition of 16*l.* 10*s.* is superfluous, and the plaintiff by his demurrer having confessed the substantial part of the plea, judgment must be given for the defendant;" which was done accordingly.

In an action on a promissory note for 30*l.*^z the plaintiff took a verdict for the whole sum; the defendant had at the same sittings an action against the plaintiff for 11*l.* to which there was a notice to set off the note; and the court held, notwithstanding the verdict, that the note might be set off; for if, at the time of the action brought, there are mutual demands, they, by the statute, may be set off, and justice may be done by entering a remittitur on the first record as to so much.

On the authority of the preceding case, it was ruled in *Evans v. Prosser*, 3 T. R. 186, that a replication to a plea of set-off, stating, that the defendant had brought an action against the plaintiff for the same sum in which the plaintiff had paid the amount of the demand into court, was bad on general demurrer.

It being a settled rule of pleading^a, that matter of defence arising after action brought, cannot properly be pleaded in bar of the action generally, a plea of set-off, in which it is stated, "that the plaintiff, *before and at the time of the plea pleaded*, was indebted," will be bad on general demurrer, if pleaded to the action generally. *Actio. non.* goes to the commencement of the suit, and not to the time of plea pleaded (98).

As to the cases in which a set-off is allowed under the preceding statutes, it must be observed,

1. That the debts sued for, and the debts intended to be set-off, must be *mutual* and due in the same right.

Hence a joint debt cannot be set against a separate demand,

^z *Baskervil v. Brown*, Bull. N. P. 180.
and ² *Burr.* 1299.

^a *Evans v. Prosser*, 3 T. R. 186. re-

cognized by *Ellenborough*, C. J. in
Le Bret v. Papillon, 4 East's R. 507.

(98) If the debt intended to be set off accrued before action brought, the plea of set-off should state, that plaintiff was indebted to the defendant at the commencement of the action. If the debt intended to be set off accrued after action brought, and before plea pleaded, then the plea of set-off should be pleaded in the form in which pleas after the last continuance are generally pleaded, viz. that the plaintiff ought not *further* to have or maintain his action.

nor a separate debt against a joint demand; but a debt due to the defendant, as surviving partner, may be set against a demand on defendant in his own right^b; and *e converso*, a debt due from the plaintiff, as surviving partner, may be set against a debt due from the defendant, to the plaintiff in his own right^c.

A defendant, sued as executor or administrator, cannot set off a debt due to defendant personally, nor can a person who is sued for his own debt set off what is due to him as executor or administrator.

The statute 2 G. 2. c. 22. s. 13. says, if either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.

It will be observed, that this part of the statute is confined to cases where the party sues or is sued as executor or administrator. Hence, where an executor sues for a cause of action arising after the death of the testator, the defendant cannot set off a debt due to him from the testator:

A. having been appointed by B. his attorney to receive his rents^d, did, after his death, receive rent arrear in B.'s lifetime; the executrix of B. brought an action against A. for the money *in her own name*, not naming herself executrix; the defendant gave notice to set off a debt due to him from the testator, which was not allowed at the trial, because the suit not being as executor, the case is not within the statute. The court of C. B. on a case made, concurred in opinion with the judge who tried the cause.

The same rule holds where the plaintiff declares *as executor*, if the cause of action arose after the death of the testator:

In assumpsit by the plaintiff as executor^e, for goods sold and delivered to the defendant by the plaintiff, as executor, the defendant pleaded a set-off for a debt due from the testator to the defendant. On demurrer the court held the plea bad; for to allow a set-off in this case, would be altering the course of distribution^f (99).

b. *Slipperv. Stidstone*, 6 T. R. 493.

c. *French v. Andrade*, 9 T. R. 582.

d. *Shipman v. Thompson*, Willes, 193.
and Bull. N. P. 180.

e. *Kilvington, executor, v. Stevenson*
cited by Erskine from Yates's MSS,
in *Teggetmeyer v. Lamley*.

f. *Duruford's note*, Willes, 264.

(99) So if the cause of action arises partly in time of testator and partly in time of executor, although the plaintiff declares as

2. A debt barred by the statute of limitations cannot be set off. If such debt be pleaded in bar to the action, the plaintiff may reply the statute of limitations^g (100).

3. Where either of the debts accrues by reason of a penalty, the debt intended to be set off must be pleaded in bar, and the defendant in his plea must aver what is really due^h.

In all other cases the defendant may either plead, or give a notice (101) of set-off, at his election (102).

^g Remington v. Stevens, Str. 1271.

^h Stat. 8 Geo. 2. c. 24. s. 5.

executor, yet defendant cannot set off a debt due from the testator to him :

In covenant by plaintiffs as executors*, for rent arrear in the lifetime of testator, and also since his death, the defendant at the trial before Lord Mansfield, at the sittings after Easter term, 25 Geo. 3. set off a debt due from the testator to him; and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this debt could not be set off in this case, and cited Shipman v. Thompson, Bull. N. P. 180, Kilvington, executor, v. Stevenson, from a MS. of Yates, J., and Ridout and another, assignees, v. Brough, Cowp. 133. Lord Mansfield, C. J. said, that he was satisfied on the point on the authority of Kilvington v. Stevenson, and made the rule absolute.

(100) If such debt be given in evidence on a notice of set off, it may be objected to at the trial. Bull. N. P. 180.

(101) The same certainty is required in this notice as in a declaration.

Indebitatus assumpsit for goods sold †: defendant in order to set off a debt due from the plaintiff to him, gave the following notice—Take notice that you are indebted to me for the use and occupation of a house, for a long time held and enjoyed, and now lately elapsed :

Lord Hardwicke, C. J. These kind of notices should be almost as certain as declarations. The legislature intended them to be in the nature of cross actions, and they should be expressed with such certainty as to enable plaintiff to make a proper defence to them. Had this been a declaration for the use and occupation of a house, it would certainly have been ill: for it must have shewn the commencement and determination of the occupation.

* Teggetmeyer and another, executors, v. Lumley, B. R. T. 25 G. 3. reported in Durnford's note to Hutchinson v. Sturges, Wilks, 264.

† Fowler v. Jones, Middlesex Sittings after H. T. 3 Geo. 2. coram Hardwicke, C. J. MSS. and Bull. N. P. 179.

The averment of what is really due, in cases where the debt accrues by reason of a penalty, has been holden to be traversable¹, though laid under a *videlicet*².

If an agreement is entered into for the performance of covenants, with a penalty, and the covenants are broken, the penalty cannot be set off:

To assumpsit for money lent³, the defendant pleaded articles of agreement with mutual covenants in a penalty for performance, and shewed a breach whereby the penalty became due, and offered to set off the same; on demurrer, the court held this plea not within the statute; Lord Mansfield, C. J. observing, that it was contrary to the intention of the acts, that the penalty should be admitted to be set off, when perhaps a very small sum was due for such damages as the defendant had actually sustained.⁴

It will be proper to remark here, that a set-off reducing the plaintiff's demand under 40s. will not affect the jurisdiction of the superior court, so as to entitle the defendant to enter a suggestion on the roll, in order to obtain costs, either under stat. 3 Jac. 1. c. 15. s. 4.^m, or under stat. 23 G. 2. c. 33. s. 19.ⁿ if it appear that a sum exceeding 40s. was due at the time of action brought (103).

i Symmons v. Knox, 3 T. R. 65.

in Pitts v. Carpenter, Str. 1191. and 1

k Grimwood v. Barrit, 6 T. R. 460.

Wils. 19.

l Nedriff v. Hogan, 2 Burr. 1024. and Bull. N. P. 180.

n Gross v. Fisher, 3 Wils. 45.

It afterwards appeared that the debt designed to be set off was for rent reserved on lease by indenture, which not being mentioned in the notice, the chief justice said, it would be bad on that account likewise, for had this been mentioned, the plaintiff might possibly have shewn that he was evicted, or some other matter, to avoid the demand. Verdict *pro querente*. N. The preceding case was decided before the stat. 11 G. 2. c. 19.

(102) In country causes it is usual to plead a set-off, in order to save the trouble and expense of proving the service of notice. Tidd's Pract. 584.

(103) The language of the two statutes is different. By the statute of James, if it appear to the judge that the debt to be recovered does not amount to 40s. the defendant shall have costs. By the statute of George, the defendant shall recover double costs, if the jury, upon the trial of the cause, find the damages for the plaintiff under 40s. unless the judge certify that, 1. the freehold, or 2. the title to the plaintiff's land, or 3. an act of bankruptcy

7. Tender.

7. *Tender*.—To an action of assumpsit the defendant may plead non assumpsit as to part of the plaintiff's demand, and a tender before the commencement of the plaintiff's suit as to the rest; but the defendant will not be permitted to plead non assumpsit to the whole declaration, and a tender as to part, because, if the general issue should be found for the defendant, it would then appear on the record, that nothing was due, although the defendant by his plea of tender had admitted something to be due.

A tender may be pleaded to a *quantum meruit*, although the demand is uncertain. *Johnson v. Lancaster*, Str. 576.

What shall be a good Tender.—In order to sustain a plea of tender, it is not necessary in all cases to prove the actual production of money, in monies numbered; it will be sufficient to shew that the defendant was in a present condition to substantiate his offer, and that the plaintiff dispensed with the production of the money (104):

o *Dowgill v. Bowman*, C. B. M. 11. *Maclellan v. Howard*, 4 T. R. 194.
 Geo. J. 2 Wils. 145. and 2 Bl. Rep. S. P.
 792. Anon. C. B. M. 40 Geo. J. MSS. p *Thomas v. Evans*, 10 East, 101.

principally came in question. It does not appear that the court in *Gross v. Fisher* adverted to this difference. N. Under the Court of Requests' Act, for Southwark, 22 G. 2. c. 47. s. 6. if the debt which was originally above 40s. be reduced below 40s. by part payment before action brought, the defendant will be permitted to enter a suggestion. *Clark v. Askew*, 8 East, 28. So under the London Court of Requests' Act, if the debt be reduced by part payment below 5l. before action brought, the defendant will be permitted to enter a suggestion. *Horn v. Hughes*, 8 East, 347.

(104) Where there is a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, may dispense with a tender of the specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender by expressly saying, that the defendant need not produce the money as he would not accept it; for, though the plaintiff might refuse the money at first, yet, if he saw it produced, he might be induced to accept it. Per Kenyon, C. J. *Middlesex Sitings*, M. T. 42 G. 3. 4 Esp. N. P. C. 69. "I take it to be clear beyond a doubt, that if the debtor tenders a larger sum than is due, and asks change, this will be a good tender, if the creditor

but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. To an action of assumpsit^q, the defendant pleaded a tender of 10*l.*; the evidence was, that the defendant having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment, and on going from home for a time, left the 10*l.* with his clerk there. Some time after the plaintiff called and demanded 16*l.* 8*s.* 11*d.* which he said he supposed Evans had received; when the clerk told him that Evans was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.* nor any thing less than his whole demand. The clerk did not offer the 10*l.* The court were of opinion the evidence was insufficient; Lord Ellenborough, C. J. observing, "it is expressly stated, that the clerk did not offer the 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it; which is not a tender in law."

If A., B., and C., have a joint demand on D., and C. has a separate demand on D.^r, and D. offer A. to pay him both the debts, which A. refuses, without objecting to the form of the tender on account of his being entitled only to the joint demand; D. may plead this tender in bar of an action on the joint demand; but it ought to be pleaded as a tender to A., B., and C.

A tender of foreign money, made current by royal proclamation, is equivalent to a tender of lawful money of England^t; but a tender of bank-notes, if objected to at the time (105), is not a good legal tender^t, nor has stat. 37 Geo. 3.

q Thomas v. Evans, ante, p. 148.

r Douglas v. Patrick, 3 T. R. 683.

s 5 Rep. 114. b.

t Grigby v. Oakes, 2 Bos. and Pul. 526.

does not object to it *on that account*, but only demands a larger sum. There is not any occasion to produce the money, if the creditor refuses to receive it on account of more being due." Per Kenyon, C. J. London Sitings, after M. T. 32 G. 3. Peake's N. P. C. 88.

(105) "This court has never yet determined that a tender in bank-notes is *at all events* a good tender; but if they have been offered, and no objection has been made *on that account*, this court has considered it to be a good tender." Per Buller, J. in Wright v. Reed, B. R. H. 30 Geo. 3. 3 T. R. 554. "It has been thought that the courts went a great way in holding a tender in bank-notes

c. 45. (commonly called the Bank Act) made any alteration in the law in this respect (106).

Defendant, being indebted to the plaintiff in 3*l*. 10*s*. produced to him a £5 bank note, and desired him to take £3 10*s*. out of that. It was holden, that it was not a good tender^a.

An offer to pay a sum of money with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid.

A tender of money to an agent authorised to receive payment, is a good tender to the creditor himself.

At what Time the Tender may be made.—The tender must be made before the commencement of the suit. The line being drawn at the commencement of the suit, steps taken by the plaintiff, in contemplation only of an action, before tender made, will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of plaintiff's suit. Hence it is not any answer to a plea of tender before the exhibition of the plaintiff's bill, that the plaintiff had before such tender retained an attorney, and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ, before the tender, which writ was afterwards sued out.

Of the Form in which a Tender must be pleaded.—Where the money is due and payable immediately by the agreement^a,

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| u <i>Betterbee v. Davis</i> , 3 Camp. N. P. C. 477. see also <i>Moffat v. Parsons</i> , 5 Taunt. 307. | |
| C. 70. per Le Blanc, J. | |
| x <i>Evans v. Judkin</i> , 4 Campb. 156. | z <i>Briggs v. Calverly</i> , 3 T. R. 629. |
| y <i>Goodland v. Blewitt</i> , 1 Camp. N. | a <i>Giles v. Hartis</i> , 1st Raym. 254. |

to be a good tender, if not objected to at the time." Per Chambre, J. in *Grigby v. Oakes*, 2 Bos. and Pul. 526.

(106) By stat. 37 Geo. 3. c. 45. § 9. affidavits to hold to bail, must allege that no offer has been made to pay the sum sworn to in notes of the governor and company of the Bank of England, expressed to be payable on demand, (fractional parts of the sum of twenty shillings only excepted.) But by stat. 43 G. 3. c. 18. persons applying to be discharged upon common bail, by reason of any defect in the allegation required by the preceding statute, must make proof by affidavit, that the whole sum, for which they have been holden to bail, was offered to be paid, either wholly in notes of the governor and company of the Bank of England, or partly in such notes, and partly in lawful money of this kingdom. See stat. 52 Geo. 3. c. 50.

the party pleading a tender must shew that he was "always ready," from the time when the cause of action accrued (107). Hence to an action of *indebitatus assumpsit*^b, where defendant pleaded that before the action, viz. on such a day, he tendered a certain sum of money, and that he was always afterwards ready, and then was ready; on demurrer, the plea was holden bad; for *per cur*, it is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action.

So where to an action by the indorsee of a bill of exchange^c, the defendant pleaded, that after the expiration of the time appointed for the payment of the bill and before action brought, he, the defendant, tendered the whole money then due upon the bill with interest, in respect of the damages sustained by the non-performance of the promise; and that he always, from the time of making the tender, had been, and still was, ready to pay, &c. On demurrer, the plea was holden bad; Lord Ellenborough, C. J. observing, that in *Giles v. Hartis*^d, it was expressly decided, that an averment of *tout temps prist* was necessary in a plea of tender, and that it was one of those land marks in pleading which ought not to be departed from.

A plea that the defendant is ready, and has always been ready, with a *profert in curia*^e, but not averring a tender, will be bad on general demurrer.

It is not necessary that a plea of tender to an action of *indebitatus assumpsit* should answer a special request laid in the declaration^f on a day subsequent to the day on which the promise is laid; because such request is surplusage, and therefore the day, on which it is made, is wholly immaterial.

At what Time a Tender must be pleaded.—It is a general rule, that a tender cannot be pleaded after any kind of imparlance^g, because the imparlance is contradictory to that part of the defendant's plea in which he alleges, that he was always ready. A tender must therefore be pleaded before

^b *Sweetland v. Squire*, Salk. 623.

^c *Hume v. Peplow*, 8 East, 168.

^d *Ld. Raym.* 254. and *vid.* *Wood v. Ridge*, Fort. 376.

^e *French v. Watson*, C. B. 2 Wils. 74.

^f *Giles v. Hart*, Salk. 622. and Carth. 413.

^g *Giles v. Hart*, Salk. 622. and Carth. 413.

(107) But where the agreement is to pay at a certain time, tender at that time, and "always ready," is a good plea. *Per Holt, C. J.* in *Giles v. Hart*, Salk. 622.

imparlance of the same term with the declaration^h, unless the declaration be delivered or filed so late that the defendant is not obliged to plead to it that term; and then it may be pleaded of course within the first four days inclusive of the next term, *as of the preceding term*.

Under particular circumstances the court will give the parties, on an early applicationⁱ, leave to plead a tender after an imparlance, as where^k the writ was returnable in Easter term, and the declaration not delivered until the day before the *essoign day* of Trinity term, on which day it was sent by the post to Shrewsbury, where the defendant lived, so that the agent could not procure instructions to plead a tender within the first four days of Trinity term.

Where the declaration is entitled of the term generally^l, and the defendant pleads a tender, upon which he would give in evidence a tender made between the first day of the term to which the bill relates, and the day of suing out the writ, he may apply to the court to oblige the plaintiff to entitle his declaration properly (108); but this application must be supported by an affidavit of a tender made on such a day^m.

After a plea of tender there cannot be a nonsuitⁿ.

Of the Replication.—To a plea of tender the plaintiff may reply a subsequent demand and refusal.

The usual form of this replication is, that, "after the making of the tender mentioned in the plea, and before the commencement of the action, the plaintiff demanded the said sum (the sum tendered), but that the defendant refused to pay the same," &c.

Issue being joined on the fact of this demand, it will be incumbent on the plaintiff to prove that he demanded the precise sum before tendered. Proof of a demand of a larger^o

^h Tidd's Prac. 384.

ⁱ Browne v. Hagan, Barnes, 357. Pitfield v. Morey, Barnes, 362.

^k Bayley v. Houldston, Barnes, 351.

^l Smith v. Key, Str. 639. Winter v. Moren, 5 G. 2. B. R. MSS. S. P.

^m Southouse v. Allen, T. 2 and 9 G. 2. B. R. MSS.

ⁿ Per Heath, J. in Gutteridge v. Smith, 2 Bl. 377. and so ruled by the same judge in Harding v. Spicer, Surrey Lent Ass. 1808. 1 Camp. N. P. C. 327. Sed. quæ.

^o Spybey v. Hide, 1 Camp. N. P. C. 181. Ld. Ellenborough, C. J.

(108) And it seems, that if the defendant omits to do this, he will not be permitted to give the tender in evidence, although he can prove the writ sued out on a day subsequent to the tender. Rolfe v. Nordin, B. R. Middlesex Sittings after M. T. 42 G. 3.—Coram Le Blanc, J. 4 Esp. N. P. C. 72.

sum than that which was originally tendered will not support the issue.

The demand ought to be made by some person authorized to give the debtor a discharge. Hence in a case where the demand had been made by the clerk to the plaintiff's attorney^p; who had never seen the defendant before going upon this errand, Lord Ellenborough held the demand insufficient; admitting, however, that a demand by the attorney himself might have done.

If to a plea of tender the plaintiff reply a latitat^q (109), and that the tender was not made before the suing out the latitat, the defendant may rejoin, that plaintiff had not any cause of action at the time of suing it out; because the plaintiff by the replication makes the latitat the commencement of the suit; therefore it may be considered in the nature of an original writ^r, and defendant ought to have the same advantage of it as the plaintiff.

The same observation which was made at the conclusion of the cases relating to the plea of set-off applies here, viz. that if by the plea of tender being found for the defendant, the balance proved on the non assumpsit is under 40s.; yet, if that, added to the sum tendered, exceed 40s. the jurisdiction of the superior court will not be affected^s, and the defendant will not be permitted to enter a suggestion on the roll in order to obtain his costs^t.

^p *Coles v. Ball*, Sittings after M. T. 49 ^r *Heaward v. Hopkins*, Doug. 44.

Geo. 3. 1 Camp. N. P. C. 478. n.

^s *Middx. Court of Conscience*, stat.

^q *Wood v. Newton*, B. R. 1 Wils. 141.

23 G. 2. c. 33. s. 19. (110).

(109) Denison, J. doubted whether the replication of a latitat was good, because it was not material when the process issued. This was upon a supposition that the latitat was only process. 1 Wils. 148. Indeed when the suing out a latitat is not replied to the statute of limitations, or to avoid a tender, or given in evidence to support a penal action, it is considered but as process, and not as the commencement of the suit. *Foster v. Bonner*, Cowp. 454.

(110) But see the words of the statute, by which it is enacted, "that if any action of debt or assumpsit shall be commenced in any of the king's courts at Westminster, and the defendant shall live or reside in Middlesex, and the jury upon the trial of such cause shall find the damages for the plaintiff under 40s. unless the judge shall in open court certify on the back of the record, that, 1. the freehold or title to the plaintiff's land, or, 2. an act of bankruptcy principally came in question, &c. the defendant shall recover double costs." See also *Clark v. Askew*, 8 East, 28.

C H A P. V.

ATTORNEY.

Of Actions brought by Attornies and Solicitors for the Recovery of their Fees. Of the Statutes 3 Jac. 1. c. 7.

§. 1. 2 G. 2. c. 23. § 23. relating to the Delivery of Bills by Attornies, and 12 G. 2. c. 13, § 6. Liability of Attornies for Negligence and Unskilfulness.

ATTORNIES and solicitors may maintain an action of debt^a, or of *indebitatus assumpsit* for the recovery of their fees. The latter form of action is that which is most usually adopted.

If a solicitor or agent for a third person retain an attorney, and promise him his fees, *indebitatus assumpsit* will lie against such solicitor or agent^b. But it seems doubtful, whether in this case an action of debt would lie^c,

An attorney may maintain an assumpsit for soliciting a cause in other courts, as well as in the court where he is attorney^d.

An attorney may sue by attachment of privilege, though his certificate has expired, and not been renewed, if it be within a year from the expiration of his certificate, and though he has been in prison for above a year before the suing out of the writ^e.

A solicitor of the equity side of the Court of Exchequer is not entitled to practise in the Court of Chancery; nor, if he does, can he maintain an action for the amount of his bill. And *semble*, that a solicitor of the Court of Chancery

^a Adm. in *Bradford v. Woodhouse*, Cro. Jac. 520.

^b *Ambrose and Roe*, Skin. 217, 218.

Adm. in *Sands v. Trevilian*, Cro. Car. 194.

^c Aff. *Bradford v. Woodhouse*, Cro. Jac. 520. Neg. *Sands v. Trevilian*, Cro. Car. 194.

^d *Therby v. Warren*, Cro. Car. 159.
^e *Prior v. Moore*, 3 M. & S. 605.

cannot, by consent in writing, authorise a solicitor of the Court of Exchequer to practise there in his name^f.

To an action of assumpsit for fees due to the plaintiff as an attorney^g, the defendant may plead the statute of limitations, viz. that he did not promise or undertake within six years next before action brought.

By stat. 3 Jac. 1. c. 7. s. 1. "No attorney, solicitor, or servant to any, shall be allowed from his client, or master, for any fee given to any serjeant or counsellor, or for any sums of money given for copies to any officers in any court of record at Westminster, unless he have a ticket subscribed with their hands and names, testifying how much hath been received or paid, and at what time; and all attorneys and solicitors shall give a true bill to their masters (1), clients, or their assigns, of all other charges concerning the suits which they have for them, subscribed with their hands and names, before they shall charge their clients with such fees or charges."

To an action brought by an attorney to recover fees for the prosecution of an *habeas corpus*^h, to remove a plaintiff levied against defendant in an inferior court, and for defending him in that suit after it was removed into the King's Bench, the defendant pleaded this statute: on demurrer judgment was given for the plaintiff; because this statute does not extend to matters transacted in inferior courts, but to suits in the courts of Westminster Hall only.

In an action brought by an attorney against an executor for feesⁱ, and sums of money expended by the plaintiff in several suits for the testator of the defendant, the defendant pleaded this statute, and that the plaintiff had not given to the testator, nor to the defendant, before the writ brought (2),

f Vincent v. Holt, 4 Taunt. 452.
g Oliver v. Thomas, 1d. Raym. 2.

h Brickwood v. Fanehaw, Carth. 147.
i Brooks v. Hugue, T. Raym. 245.

(1) *Indebitatus assumpsit* for agents' fees. It was objected on the part of the defendant that plaintiff ought to prove a bill delivered. For the plaintiff it was insisted, that agents were not within this statute; that, at the time when it was made, agents were unknown; that the attorneys then came to London to solicit their causes in person. Lee, C. J. was of opinion, that the case was not within the statute, but offered to save the point. Verdict for plaintiff, Jones one, &c. v. Price, B. R. May, 19, 1746. See also Bridges one, &c. v. Francis, Peake's N. P. C. 1, 2. where Kenyon, C. J. expressed the same opinion.

(2) This allegation seems essential, for in Clark v. Godfrey, Strange, 633. it was settled, by the Court of Common Pleas, on

any bill of charges according to the statute: on demurrer, it was adjudged a good plea.

In *Milner v. Crowdall*, 1 Sflow. 388. where the same plea was pleaded, on demurrer, because defendant had not averred his plea, the objection was overruled, the plea being in the negative (3).

By stat. 2 Geo. 2. c. 23. s. 23. (made perpetual by stat. 30 Geo. 2. c. 19. s. 75.) for the better regulation of attorneys and solicitors, it is enacted, that "no attorney of the Courts of King's Bench, Common Pleas, or Exchequer, &c. nor any solicitor in Chancery, &c. shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements (4), at law or in equity, until the expiration of one month (5) or more, after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, or left for him, at his dwelling-house (6), or last place of abode, a bill of such fees, charges, and disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length (7), except times and sums, which bill shall be subscribed with the proper hand of such attorney or solicitor; and upon application of the party chargeable by such bill, or of any other person in that behalf authorised, unto the Lord Chancellor, or the Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts, respectively, in which the business contained in such bill, or the greatest part thereof in

great consultation, that the bill must be delivered before action brought, in order that the client may have opportunity of looking it over, before he incurs further expense.

(3) In this case it was said by the court, that this statute might be given in evidence under the general issue.

(4) Charges for conveyancing are not within this statute. See post, *Hill v. Humphreys*, p. 158. and 2 Bos. and Pul. 345. See also *Butler's N. P.* 145. Money paid by an attorney for costs which his client is adjudged to pay, is a disbursement within this statute. *Crowder, Lavis, and Co. v. Shee*, 1 Camp. N. P. C. 437.

(5) The term "month" here means a lunar month. *Hurd v. Leach*, 8 Esp. N. P. C. 163. *Ellenborough, C. J.*

(6) Leaving at the counting-house is not sufficient. 2 Bos. and Pul. 343.

(7) By statute 12 G. 2. c. 13. s. 1. every attorney, clerk in court, and solicitor, may write his bill of fees, charges, and disbursements, with such abbreviations as are now commonly used in the English language.

" amount or value shall have been transacted, they may refer the bill, &c. to be taxed (although no action be depending in such court touching the same)."

The foregoing provisions, being beneficial to the subject, have received a liberal construction^k; hence, where part of the charges of an attorney's bill was for drawing an affidavit, and for attendance on the party at the swearing, it was holden, that they were charges for proceedings in court, because the oath must either be administered by the court, or by some authority delegated by the court, and that an action could not be maintained for the recovery of such charges, because a bill had not been delivered a month before the action was brought. So where an action was brought for the amount of a bill for business done at the quarter sessions^l, upon a prosecution for an assault, it was holden, that the action could not be maintained, because there was not any signature to the bill which had been delivered (8).

The bill must be left with the party charged^m, for in a case where the plaintiff had delivered his bill to the defendant in due time, who acknowledged the debt, and said that he would pay it, but that he did not know what to do with the bill, upon which the plaintiff took it back again, it was holden, that the bill ought to have been left with the defendant; for the intention of the statute was, that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary.

In like manner it has been holdenⁿ, that although an attor-

^k Winter one, &c. v. Payne, 6 T. R. m Brooks v. Mason, 1 H. Bl. 290.

^l 1045.

ⁿ Crowder v. Shree, 1 Camp. N. P. C.

^l Clarke v. Douvan, 5 T. R. 694.

437.

(8) Buller, J. had ruled otherwise in Stephenson v. Taylor and another, York Summer Assizes, 1786, on the ground that the statute was confined to business done in a court of record, wherein attorneys are admissible and sworn. See the first section of the statute 2 G. 2. c. 29. and quære to what courts does the word aforesaid in § 23. refer?

An attorney's bill may be referred to be taxed, though all the business charged was done at the quarter sessions. *Ex parte Williams*, 4 T. R. 496. So a *dedimus potestatem* charged on an attorney's bill, is a sufficient item to enable the court to refer the bill for taxation, though with this exception it be entirely for conveyancing. *Ex parte Probert*, 1 Bos. and Pul. N. R. 266. So a charge for preparing a warrant of attorney renders the bill liable to be taxed. *Sabdon v. Bourn*, 4 Campb. 68.

ney shews his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is notwithstanding bound to leave a copy of the bill with him.

Where several are jointly liable to an attorney for business done^o, the delivery of a copy of a bill to one of them from whom the attorney has received his instructions^p, is sufficient.

The bill having been delivered a month before the commencement of the action^q, and the party charged not having made any application to have the bill taxed during that interval, he will not be permitted to question the reasonableness of the items before a jury (9).

In an action to recover the amount of a bill for business done by plaintiff as attorney to defendant^r, it appeared, that the bill, among other taxable items, contained two items, which could not be considered as "fees, charges, or disbursements, at law or in equity," viz. one item for costs paid upon a discontinuance, and another for preparing a case and laying it before a special pleader. It was admitted, that a bill had been delivered, but insisted that it had not been delivered according to the directions of the act^s, and it was contended, that the two items not being taxable, plaintiff was entitled to recover upon them without the previous delivery of a bill, for the imperfect delivery was tantamount to no delivery. Eldon, C. J. said, "That the rule which had been adopted concerning charges for conveyancing, either did not stand on any principle, or it decided this case; that the expenses of conveyancing, as such, were not taxable, they were not to be considered as "fees, charges, or disbursements, at law or in equity;" but if one single item, which might be so considered, though to the amount of 3s. 4d. only, was to be found in the bill, the plaintiff could not recover for the conveyancing without the delivery of such bill; for in such case the charges for conveyancing fell within the rule of the statute, and on these principles, namely, that what was paid

o Per Ellenborough, C. J. 1 Camp. N. P. C. 439.

p Finchett v. How, 2 Camp. N. P. C. 277.

q Williams v. Frith, Doug. 197.
Hooper v. Till, Doug. 198. S. P.

r Hill v. Humphreys, 2 Bos & Pul. 343.

s It had been delivered at the defendant's counting-house instead of his dwelling-house, as the act directs.

(9) But the bill may be taxed after action brought, and at any time before the verdict of judgment, unless the money has been paid. Shaw v. Pickering, B. R. M. 30 G. 3. Doug. 198. in n. 4

for conveyancing was paid in the character and in the exercise of the duties of an attorney, and that the statute attached upon the whole demand, which he had in that character. If that were so, he did not see how the charges for conveyancing were to be distinguished from the two items in this case." The other judges concurred with the C. Justice, and it was holden, that the plaintiff could not recover for any part (10).

The statute 2 Geo. 2. c. 23. § 23. only requires the delivery of a bill, for the *purpose of bringing an action*; and therefore, though an attorney cannot *bring an action* on his bill^t, till it has been delivered a month, that step is not necessary to be taken in order to enable him to set it off. But in this case he must not produce it at the trial by surprise; he ought to deliver it time enough to have it taxed before trial.

Delivery of the bill is conclusive evidence* against an increase of charge in a subsequent bill on any of the items contained in it; and strong presumptive evidence against any additional items.

A copy of an attorney's bill* (the original having been delivered to the defendant) will be received in evidence, without proof of notice to produce the original.

By stat. 12 G. 2. c. 13. § 6. "the provisions contained in
" stat. 2 G. 2. c. 23. § 23. shall not extend to any bill of fees,
" charges, and disbursements, due from any attorney or soli-
" citor, to any other attorney or solicitor, or clerk in court,

t *Martin v. Winder*, B. R. E. 23 G. 2. u *Lovridge v. Botham*, 1 Bos. & Pul.
Doug. 199. n. 49.

x *Auderson v. May*, 2 Bos. & Pul. 437.

(10) It may be observed, that in this case a bill had been delivered, but not at the place where the statute directed; but in a case where a bill had not been delivered, Kenyon, C. J. allowed the plaintiff to give evidence of conveyancing business, although he was precluded from recovering upon the rest of the demand, on account of having omitted to deliver a bill. *Miller v. Towers*, Peake, N. P. C. 102. "As no bill had been delivered, Lord Kenyon felt himself at liberty to consider the demand for conveyancing, in the nature of a demand made in an action for conveyancing only." Per Lord Eldon, C. J. in 2 Bos. and Pul. 345. The same doctrine was laid down in *Mowbray, Gent. one, &c. v. Fleming*, 11 East, 285. where no bill having been delivered, the plaintiff was permitted to recover for such items as were not taxable; although a bill of particulars had been delivered under a judge's order, and such bill contained other taxable items.

"but every such attorney, &c. may use such remedies for the recovery of his fees, &c. against such other attorney or solicitor, as he might have done before the making of the said act."

It has been decided, that the object and spirit of this clause is, that the restrictions of 2 G. 2. c. 23. should not be applied where both parties were attorneys, when the action was brought, for in such case the defendant must be taken to be fully competent to understand the nature of the charges in the bill, and to resist them if exorbitant or improper. Hence an action may be maintained by one attorney against another, for business done by the plaintiff for the defendant before he became an attorney, without leaving a bill signed according to the directions of stat. 2 G. 2. c. 23 (11).

It is clearly established as a rule of practice, that negligence cannot be set up as a defence to an action on an attorney's bill; for the plaintiff does not come prepared to prove any thing more than the business done, and is not in a situation to meet a charge of negligence (12).

y Ford, one, &c. v. Maxwell, one, &c. z Templar v. McLachlan, 3 B. & P. N. 2 H. Bl. 539.

(11) In *Nelson v. Garforth*, 1 Esp. N. P. C. 221, Lord Kenyon, C. J. ruled, that where an action is brought by one attorney, for business done as an agent to another attorney, the plaintiff is not obliged to deliver a bill signed. See also *Bridges one, &c. v. Francis*, Peake's N. P. C. 1, 2. S. P. admitted. But the bill of an agent to an attorney in the country, may be taxed by the master. *Dixon v. Plant*, Doug. 199. n. [1.] 200 n. *Ex parte Bearcroft*, C. B. E. 7 Geo. 3. Doug. 200. n.

(12) "I do not go the length of saying that in no case can negligence in the party suing be used as a defence to the action, though I think it can only be used, where the negligence has been such, that the party for whom the business was done has thereby lost all probability of benefit from such business." Per Sir J. Mansfield, S. C. The same doctrine was laid down by Lord Ellenborough, in *Farnsworth v. Gerrard*, M. T. 48 G. 3. B. R. 1 Camp. N. P. C. 38. "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way,) that in cases of this kind, a cross action for the negligence was necessary; but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule, * that if there

* See *Denew v. Daverell*, 3 Camp. N. P. C. 451.

An attorney is not liable to be assessed in the poor rates in respect of the profits of his profession^a.

Assumpsit on an attorney's bill^b.—To prove that a copy of the bill had been delivered pursuant to the statute, the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's books, when the defendant's counsel objected that no notice had been given to produce it. It was insisted that this was unnecessary, and *Jory v. Orchard*, 2 Bos. & Pul. 30. and *Anderson v. May*, 2 Bos. & Pul. 237. were cited; but, per Lord Ellen-

^a *R v. Startiant*, 7 T. R. 60.

^b *Phillips v. Gant*, 10 E. R. 110. *2 Camp. N. P. C. 110.*

has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, thus shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit. There is a distinction, however, in this respect between a contract and a security; for in an action on a bill of exchange, a partial failure of consideration is no defence; as where a bill had been accepted for the price of some hams, which turned out so bad that they were almost unmarketable; this was held to be no defence, but the defendant must seek his remedy by a cross action. *Morgan v. Richardson*, 1 Camp. N. P. C. 40, n. recognised by Ld. Ellenborough, C. J. in *Tye v. Gwynne*, 2 Camp. N. P. C. 546. In *Morgan v. Richardson*, money had been paid into court, but Ld. Ellenborough said, that that circumstance formed no ingredient in the opinion he then expressed.—A. and B. entered into an agreement for the sale of the lease of a house; B. was let into possession and accepted a bill for the purchase money; in an action brought by A. against B. for non-payment of the bill, it was held, that B. could not defend the action by proving that A. had failed to execute an assignment of the lease—but that B. must bring a cross action, or go into equity for a specific performance. *Montague v. Jones*, 3 Camp. N. P. C. 38. See further on this subject the case of *Fisher v. Samuda* and another, 1 Camp. N. P. C. 190. where Ld. Ellenborough expressed an opinion, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action, on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered.

borough, C. J.* If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party and the other is preserved, as they may both be considered as originals, and they have equal claims to authority, the one which is preserved may be received in evidence without notice to produce the one which was delivered. So it must have been in the cases which have been cited, and if a duplicate of the bill delivered is offered I am ready to receive it. But I am quite clear, that this evidence from the plaintiff's books is inadmissible to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit, and I remember when the point was first ruled by Mr. Justice Wilson, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum." Plaintiff nonsuited.

Liability of Attornies.—An action on the case may be maintained by a client against his attorney for negligence or unskilfulness in the discharge of his professional duty; as where an attorney neglected to charge a defendant (a prisoner) in execution within the time allowed by the practice of the court, by reason of which neglect the defendant was superseded; it was holden^a, that the action was maintainable against the attorney for negligence, but that as it sounded in damages, it was competent to the jury to find what damages they thought fit, and that they were not restrained to find the amount of the whole debt, in a case where it appeared that the debtor was not totally insolvent, and that the creditor might probably in time obtain some part of his debt by execution against his goods.

But it is not every neglect that will subject an attorney to such an action; for an attorney is only bound to use reasonable care and skill in managing the business of his client.—He is only liable for *crassa negligentia*.—Hence an action cannot be maintained against an attorney for negligence in not discovering a defect in the memorial of an annuity, which was subsequently holden to be a defect, upon a doubtful construction of the statute^d.

The solicitor under a commission of bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees; but if the solicitor agree with the

^a Russell v. Palmer, 3 Wils. 325. See Pitt v. Valden, 4 Burr. 2060. ^d Baile v. Chandless, 3 Camp. N. P. C. 17.

petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger*.

In an action against an attorney^f for suffering M. C. a debtor in custody at the suit of the plaintiff to be superseded, it was averred that M. C. was indebted to the plaintiff. It appeared in evidence that at the time of contracting the supposed debt, M. C. was a married woman. This was holden to be a fatal variance.

* *Hartop v Jucker*, 2 M. & S. 438.

^f *Lee v. Ayrton, one, &c. Peake's N. P. C. 119.*

C H A P. VI.

AUCTION.

Of Agreements relating to the Sale of Lands and Goods by Auction. Cases where the Duty attaches. Liability of Auctioneer. Recovery of Deposit and Interest on Defect of Title.

A SALE of lands by auction is within the 4th section (1) of the statute of frauds (29 Car. 2. c. 3.), and to make it binding, the solemnities required by that statute must be observed^a: the auctioneer is to be considered as the agent of both parties^b. With respect to sales of goods by auction, it has not been decided^c that such sales are within the 17th section (2) of the same statute; but the better opinion seems to be that they are. Assuming that they are, it has been determined that the auctioneer is the agent of both parties, and that a note or memorandum in writing of the bargain, made and signed by him, will be sufficient to give validity to

^a Walker v. Constable, 1 Bos. & Pul 306

^b Kerneys v. Proctor, 3 Ves. & Beames, 57.

(1) By which it is enacted, that "no action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(2) By which it is enacted, that "no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

the contract. The defendant bought a lot of goods for more than 10*l*. at an auction^c. Catalogues and conditions of sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name, and the price, against the lot in the printed catalogue, by order of the defendant. Between the day of sale and the time fixed by the conditions for taking the lot away, the defendant sent his servant to see them weighed, which he did. The defendant neglecting to take away the goods, they were resold at a considerable loss, and an action was brought for the difference; and the court strongly inclined—1. That sales by auction were not within the statute of frauds, because a number of persons are generally present, who can testify the terms of the contract: 2. They held the contract here was sufficiently reduced into writing and signed by an agent of the defendant's, for the auctioneer for that purpose was his agent (3): 3. They held the weighing by his servant was a delivery: 4. Yates, J. held, that, as the contract was executory, viz. the lot to be taken away in six weeks, it was not within the statute (4).

A bidding at an auction may be retracted before the hammer is down, because the assent of the seller is not signified till that takes place^d.

Verbal declarations of the auctioneer, superadding any term to^e, or contrary^f to the printed conditions of sale, are not admissible in evidence.

An action will not lie against an auctioneer for selling a horse at the highest price bid for him^g, contrary to the owner's express directions, not to let him go under a larger sum.

c *Simon v. Motivos*, 3 Burr. 1921. d *Payne v. Cave*, 3 T. R. 148.
more fully stated in Bull. N. P. 280. e *Powell v. Edmunds*, 12 East, 6.
under the name of *Simon v. Metivier*. Best Report in 1 Bl. Rep. 599. f *Gunnis v. Erhart*, 1 H. Bl. 289.
g *Bexwell v. Christie*, Cowp. 295.
cited in *Mason v. Armitage*, 13 Ves. Jan. 25.

(3) This rule has been acted upon ever since this decision; and in conformity with such rule, it has been holden, that, upon sales made by brokers acting between the parties buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, are a sufficient compliance with the statute to render the contract of sale binding on each. See the opinion of Lord Ellenborough, C. J. in *Hinde v. Whitehouse*, 7 East, 369.

(4) If any money is paid as a deposit, though short of the sum stipulated by the conditions, and accepted as such by the auctioneer, it will bind the bargain quoad the auctioneer. *Hanson v. Roberdeau*, Peake's N. P. C. 120.

The plaintiff was an auctioneer, and employed by J. S. to sell his goods by auction^h. The sale was at the house of J. S. and the goods were known to be his property. The defendant bought goods to the amount of 7*l.* 9*s.* 6*d.* and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hands for five guineas as for a debt due from J. S. to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods: afterwards the plaintiff, being called upon by J. S., paid to him, as he refused to accept the receipt, the whole sum for which the goods were sold to the defendant, and brought an action against the defendant for goods sold and delivered, money had and received, &c. in order to recover the five guineas. After verdict for the plaintiff, Lord Loughborough, Gould, J., and Heath, J. were of opinion, that the action might be maintained, on the ground that an auctioneer has a special property in the goods which he is employed to sell, and that it is the same thing whether the goods be sold on the premises of the owner or in an auction-room. Wilson, J. thought the verdict right, 1. Inasmuch as the party who has gained possession of the goods should be estopped from saying, to avoid a just payment, that there was not any property in him from whom the possession was derived; 2. That every part of the declaration was proved, and property was not stated to be in the plaintiff, but only that the goods were sold and delivered by him to the defendant, which was proved, and afforded a strong reason, why the defendant should not be permitted to dispute the effect of the sale and delivery.

If the owner of an estate, put up to sale by auctionⁱ, employ puffers to bid for him, it is a fraud on the real bidders (5), and the highest bidder cannot be compelled to complete the contract.

^h Williams v. Billington, 1 H. Bl. 81.
ⁱ Howard v. Castle, 6 T. R. 642. recog-

nised by Grose and Lawrence, Jr. in
 8 T. R. 93, 95.

(5) The owner may legally and fairly bid, either by himself or an agent, if before the bidding begins he gives public notice of his intention, and in such cases if he becomes the purchaser, he may claim an allowance of the duties, (see the statutes 17 G. 3. c. 50. s. 10. and 19 G. 3. c. 56. s. 12.) provided, that the notice required be given, and the delivery thereof verified upon the oath of the auctioneer, together with the fairness of the transaction.

If the agent of the owner put up an estate in so many lots², and no person bidding for the same, he puts it up again, in fewer lots at other prices, and still no person bidding, he puts it up again in one lot at a certain price, and on there not being any bidding, the estate is withdrawn from sale; this is not a *bidding* of the owner by an agent, so as to subject the party to the auction duty, for want of a notice in writing to the auctioneer (previously to the auction) of such agency, as required by statutes 19 G. 3. c. 56. (6) and 28 G. 3. c. 37. in order to excuse the owner from the payment of such duty.

k *Croso v. Crisp*, 5 East's R. 337.

(6) The statute 19 G. 3. c. 56. s. 5. reciting that a duty of 3*d.* is to be paid for every 20*s.* of the purchase money arising by sale at auction of any interest, &c. in any lands, &c. and 6*d.* for every 20*s.* out of the purchase money arising by sale at auction of all fixtures, furniture, &c. and that doubts may arise, whether the said duties are payable for any part of such purchase money not amounting to 20*s.*, to obviate such doubts, enacts, and declares, that the said duties were intended to be charged for every 20*s.* of the said purchase money, and so in proportion, &c.

By sect. 6. "The said duties are declared to be a charge upon every auctioneer or seller by commission, immediately from and after the knocking down of the hammer, or other closing of the bidding, at every sale by way of auction, and that the duties so charged, shall be paid by every such auctioneer or seller by commission, in manner and at the times thereafter mentioned."

By sect. 7. "Every auctioneer receiving his licence, shall give bond to his Majesty in 200*l.*, with sureties, that he will within 28 days after each and every sale, by way of auction, deliver at the excise office in London, an exact and particular account in writing, of the total amount of the money bid at each sale, &c. and at the same time make payment of all such sums of money as shall be due to his Majesty in pursuance of this act, which sum he is thereby authorized to retain out of the proceeds arising by such sale, or deposit made at such sale, or otherwise recover the same by action of debt, or on the case, against such person by whom such auctioneer shall be employed, &c."

Provided (by sect. 12.) "that in case the real owner of any estate, &c. put up to sale by way of auction, shall become the purchaser by means of his own bidding, or the bidding of any other on his behalf, &c. at such sale, without fraud or collusion, then and in such case the commissioners of excise, &c. are authorized and required to make an allowance to such owner of the duties arising by this act upon such bidding, provided notice be given to the

An auctioneer was employed to sell an estate¹; the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick, at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 G. 3. c. 56. and 28 G. 3. c. 37.; but being asked at the sale, whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty: It was holden, that the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes, under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner; he having in effect warranted, that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken as to the law.

In an action for *money paid, laid out, and expended*, it appeared in evidence, that the defendant had employed the plaintiff, an auctioneer, to sell an estate. The plaintiff accordingly put it up to sale, and it was knocked down to a purchaser, who afterwards refused to complete his purchase, on the ground of a defect in the title. An action was brought against the present plaintiff, to recover the deposit; notice of the action was given to the defendant, and he was required to defend it, but declined: whereupon the plaintiff paid the deposit and interest, together with costs of suit, and now brought this action to recover the same as well as the auction duty, which he had been compelled to pay. Lord Ellenborough, C. J. "The money paid on account of

1 *Capp v. Topham*, 6 East's R. 392.

" auctioneer before such bidding, both by the owner and the person intended to be the bidder, of the latter being appointed by the former, &c. to bid *, &c.; and in case of any unfair practice, " then no such allowance shall be made;" and by stat. 28 G. 3. c. 37. s. 20. this notice to the auctioneer is required to be given in writing. See further statutes relative to auctions and auctioneers, 29 G. 3. c. 63.—32 G. 3. c. 11.—36 G. 3. c. 123. s. 1.—37 G. 3. c. 14. duties.—39 G. 3. c. 84. s. 2, 3.—42 G. 3. c. 93. s. 1, 2, 3. amended by 43 G. 3. c. 130.—45 G. 3. c. 30. duties.

* See 42 G. 3. c. 93. s. 1, 2.

the costs in the cause, cannot be recovered in this form of action, which is for money paid only; to recover in such action it should appear *clearly* to be money actually and necessarily paid to the use of the party. There should have been a special count, inasmuch as the right of the plaintiff to the costs is not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, and in that case they would have been incurred without his consent. If the plaintiff had declared specially, the defendant would then have had notice of these points, the plaintiff's claim would have been on the record, and the defendant might have been prepared to contest it, which, under the present declaration, he cannot; the plaintiff may recover for the money actually paid on the other accounts." *Spurrier v. Elderton*, 5 Esp. N. P. C. 1.

Where an estate is sold by auction^m, if a good title is not made out according to the conditions of sale, and an action is brought against the auctioneer for the recovery of the deposit who pays money into court, such action may be maintained, the deposit not appearing to have been paid over to the principal (7).

It must be observed, however, that in this action the deposit only, with interest from the time of sale, and not any further damages for the supposed goodness of the bargain, can be recoveredⁿ. In cases of this kind, it is proper to add to the declaration a specific count for the interest, for interest cannot be recovered on a count for money had and received^o. The expences incurred in investigating the title may be recovered, if laid in the declaration as special damage^p, but not on the count for money paid^q.

Where leasehold premises are sold by auction and the lease containing the usual covenant to repair is produced and

^m *Borough v. Skinner*, 5 Burr. 2639.

ⁿ *Flureau v. Thorhill*, 2 Bl. Rep. 1078.

^o *Walker v. Constable*, 1 Bos. & Pul. 307. *Tappenden v. Randall*, 2 Bos. & Pul. 472. *Sed quære*. And see *Maberley v. Robins*, 5 Taunt. 625.

^p *Pratt v. Ellis*, *Sugden's Law of V. and P.* p. 588. ed. 2d. *Jones v. Dyke*, ib. 589. *Turner v. Beaurain*, ib. 177. *Richards v. Barton*, 1 Esp. N. P. C. 968.

^q *Camfield v. Gilbert*, 4 Esp. N. P. C. 221.

(7) Auctioneer is personally liable where he does not name his principal. *Per Kenyon*, *C. J. Hanson v. Roberdeau*, *Peak's N. P. C.* 120.

read to the bidders, if a part of the buildings, *e. g.* a summer-house, damaged and described in the lease, has been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover his deposit. *N.* The summer-house was not described in the particulars of sale^r.

Assumpsit for money had and received^s. Plea, N. A. This action was brought to recover the deposit money paid by plaintiff, who was the purchaser of an annuity sold by defendant (an auctioneer) at a public auction^t. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity to shew him the title deeds, but he not having them in possession, gave him an abstract of the title which did not mention any of the deeds. Bearcroft suggested that application ought to have been made to the vendor at an earlier period, in order to enable him to procure the title deeds by the 10th of July.

Kenyon, C. J. "A seller of an estate ought to be prepared to produce his title deeds at the particular day. A court of equity will, under particular circumstances, enlarge the time^s; but then, the circumstances entitling him to such indulgence must clearly appear, which is not the case in this instance. It is objected, that the plaintiff had no right to the possession of the deeds: but though he had no right to keep them, he had a right to inspect. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expence, with an undertaking to produce them thereafter at the vendee's expence for the support of his title. As the seller has here failed in completing his engagement, plaintiff is entitled to a return of the deposit." Verdict for plaintiff 280*l.* amount of deposit.

An action for money had and received was brought to recover the amount of a deposit paid by the plaintiff to the defendant^s, on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed. The abstract of the title delivered to the plaintiff began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry it

^r *Grauger v. Worms*, 4 *Campb.* 83.

^s *Berry v. Young*, 2 *Esp. N. P. C.* 640.

^t *Langford v. Pitt*, 3 *P. Williams*, 630. But see *Lloyd v. Collett*, in Court of Chancery, 28th Nov. 1793, on motion for injunction. 4 *Bro. C. C.*

469. 4 *Ves. jun.* 689. Cited also by Graham, Baron, in *Omerod v. Hardman*, 5 *Ves. jun.* 737. See also *Wynn v. Morgan*, 7 *Vesey*, 302. *Cornish v. Rowley*, B. R. *Middlesex Sittings after M. T.* 40 G. 3. MSS.

was found that the fact of the deeds having been lost was not true. The counsel for the defendant said, they were ready to make out a good title. Kenyon, C. J. "As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those, whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day, on which it was agreed, that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, feme covert, &c. Erskine for the defendant: "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" Kenyon, C. J. "He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day." The jury found a verdict for the plaintiff accordingly.

A contract to make a good title, means a title good both at law and in equity. Therefore in an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, a court of law will collaterally inquire whether the title be good in equity.

CHAP. VII.

BANKRUPT.

- I. *Of Persons liable to be Bankrupts.*
 - II. *Of Persons not liable to be Bankrupts.*
 - III. *Of the several Acts of Bankruptcy.*
 - IV. *Of Property in the Possession of the Bankrupt as reputed Owner.*
 - V. *Of Payments made to and by Bankrupts, protected by Statutes.*
 - VI. *Of Actions which may be brought by the Assignees of a Bankrupt, and in what Manner they ought to sue.*
 - VII. *Of Actions by the Bankrupt.*
 - VIII. *Of the Pleadings.*
 - IX. *Of the Evidence, and Witnesses.*
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I. *Of Persons liable to be Bankrupts.*

ANY person (1) being a trader, and capable of contracting in the way of trade, may become a bankrupt.

(1) Lord Hardwicke, Ch. refused to supersede a commission which had been taken out against a clergyman, who was proved to have been a trader, and had committed an act of bankruptcy, although it was urged that clergymen were prohibited from trading by stat. 21 H. 8. c. 13. s. 5. and that all contracts made by them in trade, were by that statute declared to be void. *Ex parte Meymot*, 1 Atk. 196.—See also, p. 201, of the same book, where Lord Hardwicke said, that a commission of bankruptcy had been taken out against a peer, an Earl of Suffolk, for trading in wines; and though

A feme covert, sole trader according to the custom of London, may bind herself by contracts made for the support of her trade, and consequently a commission of bankrupt may be taken out against her with respect to her separate effects in trade^a.

The term "*bankrupt*," is appropriated exclusively to traders, and to such traders only, as are either within the general or specific descriptions contained in the several statutes relating to bankrupts. From those statutes, and the construction which they have received in adjudged cases, it may be collected, that the following persons are subject to the bankrupt laws, viz.

Any person, natural born subject^b, alien^c, or denizen using the trade of merchandize by way of bargaining, exchange, re-exchange, bartry, chevesance, or otherwise, in gross or by retail, or seeking his or her trade or living, by buying and selling; banker^d; brickmaker, that is a person who rents a brick ground, and makes bricks thereon for public sale^e (2); broker^f (4); butcher^g; factor^h; shoemakerⁱ (5).

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|---|----------------------------------------------------|-----------------------------------------------------------------------|
| a | Lavie v. Phillips, 3 Burr. 1776. and 1 Bl. R. 570. | reversing the judgment in C. B. (3) Sutton v. Werley, 7 East, 442. |
| b | 13 Eliz. c. 7. s. 1. 1 Jac. 1. c. 15. s. 2. | f 5 G. 2. c. 30. s. 39. |
| c | 21 Jac. 1. c. 19. s. 15. | g Dally v. Smith, 4 Burr. 2148. |
| d | 5 G. 2. c. 30. s. 39. | h 5 G. 2. c. 30. s. 39. |
| e | Wells v. Parker, B. R. 1 T. R. 34. | i Crampe v. Barne, Cro. Car. 31. Stanley v. Osbaston, Cro. Eliz. 468. |

there might be some powers that the commissioners of bankrupts could not exercise against a peer, yet, notwithstanding this, he might be liable to a commission of bankruptcy, *if he would trade*; and so might a member of the House of Commons. See also Highmore v. Molloy, 1 Atk. 206. where Lord Hardwicke said, that a public officer, as an exciseman, &c. if a trader, made himself subject to the bankrupt laws. A servant of an ambassador may be a bankrupt. 7 Ann. c. 12. s. 5.

(2) Lord Thurlow, Ch. held, that a person who sold large quantities of bricks, made of earth taken from the waste, without any licence from the lord, was a trader. *Ex parte Harrison*, 1 Bro. Ch. Ca. 173.

(3) It must be observed, that a writ of error was brought on this decision in the House of Lords, which was there argued, and thereupon the following questions were put to the judges: 1. whether the finding in the special verdict was sufficient, whereupon to give final judgment; 2. if the finding was insufficient, what award ought to be made on such finding; 3. whether, if the finding was sufficient, the plaintiff in error appeared to be a trader within the

Innkeepers^k and publicans^l, who sell liquors out of their houses in large quantities to *all* persons who apply for them, have been holden to be traders. So a person, who having been a horse-dealer, became a farmer, and in two years bought and sold, for profit, five or six horses, not calculated

^k Patman v. Vaughan, 1 T. R. 378 July 19, 1806. coram Ellenborough,
^l Holme & Wilson, assignees of Pierce. C. J. ^{ad. 220}
 v. Bough, B. R. London Sittings,

true intent and meaning of the statutes concerning bankrupts? And the Lord Chief Baron having delivered the unanimous opinion of the judges present upon the first question in the negative, and upon the second question, that a writ of *venire facias de novo* ought to be awarded, it was thereupon ordered and adjudged, that the judgment given in the Court of King's Bench, reversing a judgment given in the Court of Common Pleas, should be reversed, and that the judgment given in the Court of Common Pleas should also be reversed, and that the special verdict given by the jury being insufficient should be annulled, and that the Court of King's Bench should award a *venire facias de novo*, and proceed according to law. 1 Bro. P. C. 545. Tomlin's edit. The plaintiff did not proceed on the *venire facias de novo*, but brought another action in the Common Pleas, which was afterwards dropped, and an action brought in the King's Bench, which was tried before Mr. Justice Buller and a special jury, 7th Dec. 1787; the jury found a special verdict; but it appearing that the plaintiff had left off brickmaking at the time when the petitioning creditor's debt accrued due, the defendant waived the special verdict, and a general verdict was entered for the plaintiff.

(4) "I am inclined to think a pawnbroker within the general words of the 39th clause of 5 G. 2. c. 30. for though pawnbrokers are not expressly named, yet the general word 'brokers' is the genus, and all other kinds of brokerage the species." Per Lord Hardwicke, Ch. in Highmore v. Molloy, 1 Atk. 206. Stockbrokers, buying and selling stock by commission, are clearly within the statutes. Cullen, 18.

(5) To the trades here enumerated may be added the following, which are *said* to be within the statutes of bankrupts, viz. bakers and tanners*. Lord Hardwicke (Exp. Burchall, 1 Atk. 141.) declared he was clearly of opinion, that a scrivener was within the 5 G. 2. c. 30. & 39, and comprehended in the words bankers, brokers, and factors. But an attorney cannot be made a bankrupt as a money scrivener, unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities. Adams v. Malkin, 3 Camp. 534. 6 Binn. C. J.

for the farming business". So if a fisherman buys fish at sea from other boats, for the purpose of making up his cargo, which he carries a-shore and sells". The rule in these cases, is, that where a person holds himself forth to the public as a general dealer in the articles which he buys and sells, or in other words, seeks his living by buying and selling those articles, such person is subject to the bankrupt laws.

A person who resides abroad, but who trades to England, coming over here occasionally, is an object of the bankrupt laws:

A. was a native of Scotland, and resided at Edinburgh, where he carried on a trade, and traded to all parts of the world. Being indebted, he came to England, where he was arrested, and lay in prison two months. It was adjudged, that A. was a person within the description of the bankrupt laws.

A trader, having retired from business, may become a bankrupt in respect of debts contracted during the period of his trading.

The proper facts having been found by a jury, it is the province of the court to determine, whether a person be a bankrupt within the meaning of any statute.

II. Of Persons not liable to be Bankrupts.

PERSONS cannot be made bankrupts for debts, which the law will not oblige them to pay. Hence, neither infants, nor *femes covert*, (except such *femes covert*, as are either sole traders, or may be considered as *femes sole*) are subject to the bankrupt laws.

The buying and selling the profits of land by a person having a chattel interest therein, is not a buying and selling within the statutes of bankrupt. Hence, where J. S. pur-

m *Bartholomew v. Sherwood*, 1 T. R. 573. n. *Stewart v. Ball*, C. B. M. 46 G. 2. 2 Bos. & Pul. N. R. 79. & post. p. 176.
n *Heaney v. Birch*, 3 Camp. N. P. C. 233.
o *Alexander v. Vaughan*, Cowp. 236. and cases there cited. *William v. Nunn*, 1 Taunt. 279. and post. p.
p *Anon. t. Vent.* 5. Ld. Raym. 227.
Willoughby v. Thornton, B. R. M.

51 G. 2. S. P. from the Norfolk Circuit.
q *Dodsworth v. Anderson*, 2 Jo. 142. cited by Ryder, C. J. May. 193.
r *Ex parte Sydebottom*, 1 Atk. 146.
R. v. Cole, Lord Raym. 443. S. P.
Per Holt, C. J. exp. Moule, 14 Ves. 641.
s *Ex parte Mear*, 2 Bro. Ch. C. 266.
t *Port v. Tusten*, 2 Wils. 169.

chased a coal-mine for so long a time as any coals could be gotten therein, paying annually a certain rent, (subject to a right of re-entry in the seller in case of non-payment of the rent) and worked the mine, and sold the coals, it was holden, that he was not an object of the bankrupt laws.

A person who had drawn bills for the purpose of raising money for the improvement of his estate^u, and had borrowed accommodation bills, in lieu of which he had given his own bills, was holden not to be within the statute of bankrupts.

A farmer^v, who *occasionally* buys and sells hay, corn, horses, &c. with a view to profit, but without making them the means of seeking his living, does not thereby subject himself to the bankrupt laws.

A builder^v, who buys timber which he works into the houses which he builds, and sells the houses when built, is not a trader within the meaning of the bankrupt laws.

The principle of the bankrupt laws, as it is to be found in the statute 34 & 35 H. 1. c. 4. is "to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and pleasures consuming the substance obtained by the credit of other men;" and the subsequent statutes were made for the better providing against the persons described by that statute, and for the more accurately defining who ought to be taken to be a bankrupt; in no one of which is there any term made use of which is not descriptive of persons to whom, in the actual course of their business, extensive credit is given, and that for the very purpose of carrying it on. And where particular employments are not specified, the general description cannot be satisfied, unless there be *both a buying and selling*: this is implied in the words, using the trade of merchandise; for a merchant is so denominated from his being a buyer to sell again. Hence it was holden^z, that a devisee for life of an estate, part of which consisted of brick ground, making bricks there for sale generally, with a view to profit, was not a trader within the meaning of the bankrupt laws, although he purchased the coals and some of the wood used in burning the bricks; for he could not be considered as the buyer of any thing to sell again, nor as a person, the course of whose business required that he should obtain great substance of other men's goods upon credit: and the selling the

^u Hankey v. Jones, Cowp. 745.

^z Stewart v. Ball, 3 Bos. and Pul. N. R. 78.

^v Clarke v. Wisdom, 5 Esp. N. P. C. 147.

^v Sutton v. Weeley, 7 East, 248.

soil, in a state essentially altered by various processes of manufacture, did not alter the character of the land-owner, nor convert him into a person, who could properly be said to carry on the trade of merchandise.

So building on a person's own land, for whatever purpose cannot be considered as a buying and selling^a.

Contractors for victualling the royal navy^b, drovers of cattle^c (6), farmers^d, graziers^e, innkeepers^f, alehouse-keepers or victuallers^g, and receivers-general^h of parliamentary taxes, are not objects of the bankrupt laws (8).

a Williams v. Stevens, 2 Camp. N. P. 1. f Newton v. Trigg, 3 Lev. 310. Skin C. 300. 292. Carth. 149. 2 Mod. 397. S. C.

b Littleton's case, 1 Vent. 270.

(7).

c 5 G. 2. c. 30. s. 40.

g Saunderson v. Rowles, 4 Burr. 9064.

d 1b.

h 5 G. 2. c. 30. s. 40.

e 1b.

(6) A person who buys and sells cattle at one fair, keeps them three or four days on his own ground, and then drives them to another, is a drover within the meaning of this statute. *Mills v. Hughes*, Willes, 588. A farmer occupying a farm of the value of £700 per annum, purchased cattle (beyond what his farm would maintain by its own produce) at one fair, kept them on his farm, and sold them at another fair. It was holden, that such person was either farmer, grazier, or drover, within the meaning of this statute, and consequently not subject to the bankrupt laws. *Bolton v. Sowerby*, 11 East, 274.

(7) In this case it was also found, that J. S. had built a ship, and had a share therein, and also 500*l.* stock upon the said ship *ad merchandizandum*, but it was not found that he traded therewith, or that he any wise traded in the ship; it was resolved by the court, that the building and having a share in a ship, was no more than if a man had a share in a barge or coach which were let to hire, &c. and that his having some stock in a ship did not make him a merchant; because it was usual for persons to adventure some particular things in such a ship for such a voyage, but that would not make them traders within the statutes, &c. for by these statutes, professed merchants only were meant, or such who were in constant trading.

See also *Cotton v. Daintry*, 1 Vent. 29, and *ex parte Bowes*, 4 Vesey Jun. 168. where Lord Loughborough, Ch. held, that the part owner of a ship who had let it out to freight, and received freight, was not an object of the bankrupt laws.

(8) Lord Kenyon, C. J. held, that a schoolmaster's buying school books and shoes, and repairing them to his scholars, was not a trading within the bankrupt laws. *Valentine v. Vaughan*, 1 Deake's N. P. C. 26. See 3 Mod. 330, *acc.*

By particular statutes^b, the holders of stock in various trading companies, are declared not liable to be made bankrupts in respect of their stocks in such companies: as the members of the Bank of England^d, East India^e, English Linen^f, Guinea^g, London Assurance^h, Royal Exchange Assuranceⁱ, South Sea^j Companies, &c. &c.

III. *Of the several Acts of Bankruptcy (9).*

THE several acts of bankruptcy, which are mentioned in stat. 13 Eliz. c. 7. s. 1. being repeated in the stat. 1 Jac. 1. c. 15. s. 2. it will not be necessary to set forth the statute of Elizabeth.

By stat. 1 J. 1. c. 15. s. 2. (10) it is enacted, that any person using the trade of merchandize, &c. who shall,

1. " Depart the realm ;"
2. " Or begin to keep house ;"
3. " Or otherwise to absent himself ;
4. " Or suffers himself willingly to be arrested for any debt
" or other thing, not grown due, for money delivered, wares
" sold, or any other just thing or lawful cause, or good consi-
" deration or purposes ;"
5. " Or shall suffer himself to be outlawed ;"
6. " Or yield himself to prison ;"
7. " Or willingly or fraudulently procure himself to be
" arrested, or his goods to be attached or sequestered ;"

i 8 and 9 W. 3. c. 20. s. 47. 7 Anne, c. 5 s. 10.

7 s. 59. 3 G. c. 8. s. 43.

o Ib.

k 13 & 14 Car. 2. c. 24. s. 3. 9 and 10 p 9 Anne, c. 21. s. 42. 3 G. 1. c. 7. s.

W. 3. c. 44. s. 74.

7 5 G. 1. c. 19. s. 27. 6 G. 1. c. 4

l 4 G. 3. c. 87. s. 13.

s. 55. 8 G. 1. c. 21. s. 12.

m 13 & 14 Car. 2. c. 24. s. 3.

(9) It appears to have been the opinion of Lord Hardwicke, Ch. in *ex parte* Smith, cited in *Alexander v. Vaughan*, Cowp. 402. that an act of bankruptcy committed abroad would not support a commission.

(10) Although this statute is written in the statute book under the year *secundo* (*vulgo primo*) Jac. 1. c. 15. it must be pleaded as of the first year: *Bryant v. Withers*, 2 Maule and Selwyn, 123.

8. "Or depart from his dwelling-house;"
9. "Or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels;"
10. "To the intent, or (11) whereby his creditors may be defrauded or delayed, for the recovery of their just and true debts;" (12)
10. By stat. 21 Jac. 1. c. 19. s. 2. "Any person using the trade of merchandize, &c. who shall, either by himself or others, by his procurement, obtain any protection other than such person as shall be lawfully protected by privilege of parliament;"
11. Or exhibit any petition or bill against his creditors, to compel them to accept less than their just debts, or to procure time;"
12. "Or being arrested for debt, shall, after his arrest, lie in prison two months or more, upon that or any other arrest or detention in prison for debt;"
13. "Or being arrested for the sum of 100*l.* or more of just debt, shall, after such arrest, escape out of prison;"
- "Shall be adjudged a bankrupt; and in the case of arrest or lying in prison, from the time of the first arrest."
14. By stat. 5 G. 2. c. 30. s. 24. "If any bankrupt, after issuing of any commission against him, pay to the person who sued out the same, or otherwise give or deliver to such person goods, or other satisfaction or security, for his debt, whereby such person shall privately have and receive more in the pound in respect of his debt than the other creditors, such payment of money, delivery of

(11) In *Fowler v. Padget*, 7 T. R. 509. it was holden that the word "or" in this part of the statute meant "and." But in *Robertson v. Liddell*, B. R. E. 48 G. 3. 9 East, 487. this construction was over-ruled, and it was decided that the words "or whereby" did not carry the sense any further than "to the intent;" and that they were equivalent to the words "or that thereby;" and this construction of the statute was most consistent with the corresponding clause in the 13 Eliz. c. 7. and the general scope of the bankrupt laws; and consequently if any of the before specified acts were done with an intention to delay creditors, the party must be adjudged a bankrupt, although no actual delay were proved.

(12) The conclusion of the corresponding section in the statute of Elizabeth is, to the intent or purpose to defraud or hinder any creditor of his just debt or duty.

“ goods, or giving greater or other security or satisfaction, shall be deemed to be an act of bankruptcy, whereby, on good proof thereof, such commission shall and may be superseded.”

Doubts having arisen, whether a commission could be sued out against traders entitled to privilege of parliament during the continuance of such privilege, and such persons not being compellable to become bankrupts, by reason of the freedom of their persons from arrests upon civil process, it was enacted, by stat. 4 G. 3. c. 33. “ that the creditors to a certain value, viz. one creditor, or two, being partners, to the amount of 100*l*. two creditors to the amount of 150*l*., and three to the amount of 200*l*. of any trader within the description of the bankrupt laws, having privilege of parliament, may (upon affidavit of the debt, and trading of the debtor, filed of record in any of the courts, at Westminster) sue out a summons, or original bill and summons, against such trader, and serve him with a copy; and if he shall not, within two months after personal service, pay, secure, or compound the debt, or enter into a bond in such sum, and with two such sureties as the court shall approve of, to pay such sum, as shall be recovered in such action, with costs, he shall be adjudged a bankrupt from the time of the service of such summons.”

This provision of the legislature was salutary, but having on some occasions, where bonds have been given in pursuance thereof, been rendered nugatory by the difficulty, and sometimes by the impossibility, of enforcing the entering appearances in the actions, for the payment of the sums to be recovered, in which such bonds had been given, it was enacted by stat. 45 G. 3. c. 121. s. 1. that, “ when any summons, or original bill and summons, shall be sued out against any person, deemed a merchant, banker, broker, factor, scrivener, or trader, within the description of the acts relating to bankrupts, having privilege of parliament, and such affidavit of the debt duly made and filed, as in the act of the 4th G. 3. c. 33. mentioned, and such merchant, &c. shall enter into such bonds as in the said act mentioned, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same; every such merchant, &c. shall also, within two months after personal service of such summons, cause an appearance to be entered to such action in the proper court in which the same shall have been brought, and on default thereof he shall be adjudged bankrupt from the time of the service of such summons:

"and any creditor may sue out a commission against any such person, and proceed therein in like manner as against other bankrupts." And by the third section, after relating, that the proceeding by distringas was extremely dilatory and expensive, it is enacted, that "when any summons, or original bill and summons, shall be sued out against any person having privilege of parliament, and no such affidavit shall be made and filed as in the said act of the 4th G. 3. c. 33. and hereinbefore is mentioned, if the defendant shall not appear at the return of the summons, or within twenty-eight days after such return, in every such case it shall be lawful for the plaintiff, upon affidavit being made and filed in the proper court of the personal service of such summons (which affidavit shall be filed gratis) to enter an appearance or appearances for the defendant, and to proceed thereon as if such defendant had entered his appearance."

The remaining sections of this statute provide for compelling an appearance in courts of equity, under similar circumstances.

1. "*Departing the Realm.*"

SINCE the decision in *Robertson v. Liddell**, in which the construction laid down in *Fowler v. Padget*, 7 T. R. 509. was over-ruled, merely departing the realm, although it is not proved that any creditor was thereby defeated or delayed in the recovery of his debt, if such departure was with an intention so to defeat or delay them, will constitute an act of bankruptcy (13).

q 9 East, 487. See also 1 Taunt 276.

(13) In the case of *Woodier**, a mercer on Ludgate Hill, against whom his going beyond sea being given in evidence, it was insisted, that shewing *quo animo* he went abroad, (viz. on account of having killed his wife) this could not be construed an act of bankruptcy; but it appearing that his creditors were thereby in fact prevented from recovering their debts, *Reeves, C. J.* held, that this was an act of bankruptcy; but if this fact had not appeared, it would have been otherwise.

So, in *Raikes and others assignees of Hervey v. Poreau*†, which was an action for money had and received, it appeared that Hervey

* *Woodier's case*, Bull. N. P. 39. † *Raikes v. Poreau*, Co. B. 125th edit. p. 73.

B. and C. having been partners in trade* in London, under the firm of B. and C., upon a dissolution of this partnership agreed that C. should, from that time, carry on the business in London on his sole account, and that B. should establish and conduct a house of trade in Dublin, under the firm of B. and C., in the profits of which C. should equally participate; that all goods ordered by B. to be purchased by C. in England, and sent by him for the use of B. and C., to be sold in Dublin, should be charged by C. to the firm at prime cost only. It did not appear that the creditors in general were apprized of this alteration. B. having come over to London for the purpose of making some arrangements with his creditors, was informed, a few days before the time which he had fixed for a meeting with them, that J. S. was about to arrest him on the following day. J. S. had furnished to the

r Williams v. Nunn, 1 Tannt. 270.

had left England with a young woman, who had refused to live with him as a mistress, unless he took her abroad. The defendant, a relation of the young woman and a creditor of Hervey, followed him to Holland, and there obtained from him a bill, for the amount of which this action was brought. *Buller, J.* said, that if it were necessary to say, whether the bankrupt left the kingdom with an intention to delay his creditors, he thought no great doubt could be entertained; but that point it was unnecessary to decide, for it had been settled in *Woodier's case*, that if a man went abroad, though not with the intention to delay his creditors, and in fact they were delayed, it was an act of bankruptcy; and he added, that he did not know that *Woodier's case* had ever been over-ruled. In a subsequent case of *Vernon v. Hankey**, London Sittings after T. 27 Geo. 3. *Buller, J.* expressed the same opinion, observing that the point had not been before the court since *Woodier's case*, but that case had always been considered and acted upon as good law.

These decisions at *Nisi Prius* clearly establish a different rule of construction from that laid down in the text of this work, and that the mere fact of departing the realm, if a creditor is thereby actually delayed, is sufficient to constitute an act of bankruptcy, although the debtor had not any such intention; but, as was truly observed by *Lawrence, J.* in *Fowler vs Padget*, 7 T. R. 516. "These cases might have received the same determination, though on a different ground; for though it was not the immediate object of the parties to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay or defeat their creditors." See further *Ramsbottom v. Lewis*, 1 Campb. 279.

* *Vernon v. Hankey*, Co. B. L. 5th edit. p. 99.

order of C., goods, which had been sent to B. and C. for sale, J. S. knowing, when he accepted the order, that they were destined for B. and C., and having credited them in his books. C. sent the goods to B. and C. without charging any profit on them. B. in consequence of the intimation, immediately returned to Dublin, to avoid being arrested. During the whole of his residence in Dublin, he had continued to keep his former house in London; his name was on the door, and his wife and family had continually resided in it. The court adjudged that there was a debt due from B. to J. S.; because the goods were furnished on the joint account, and that B. had committed an act of bankruptcy by departing the realm with an intent to delay a creditor.

2. "Beginning to keep House."

The observation which has been made on the act of departing the realm may be repeated here, viz. that the beginning to keep house with intent to delay creditors, will constitute an act of bankruptcy, although it is not proved that a creditor was in fact delayed. The intention to delay creditors must be found, in order to complete the act of bankruptcy, but the time during which the debtor has kept house is immaterial, whether it be an hour or a day¹.

The usual evidence of this act is a denial to a creditor, who calls for money (14).

In *Dickinson v. Foord*, Barnes 160. it was holden, that

¹ Agreed in *Heylor v. Hall*, Palmer, 325.

(14) "A denial by order of a trader to a creditor is not of itself an act of bankruptcy, but only evidence of it, and therefore to be explained. If a man is sick, or if a man lives three days in business, and the rest of the week in the country, this explains a denial at any other house or lodging at any other part of the town, saying, 'Go to the shop.' On the other hand, it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny any particular person by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping the house within the meaning of the statute." Per Lord Mansfield, C. J. in *Round v. Hope and Hyde*, Co. B. L. 5th edit. p. 94. "Although an authorized denial to a creditor, requiring to see his debtor, is the most usual and familiar evidence of *beginning to keep house* within the meaning of the statute, it is not the only evidence by which this may be proved. If a trader

keeping house with intent to delay creditors, without an actual denial, was sufficient; but in *Garret v. Moule*, 5 T. R. 575. a different rule was laid down, viz. that there must be an actual denial to a creditor, with intent (15) to delay him; and Lord Kenyon, C. J. said, that on trials in cases of

has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established, by proof of his having done so. And, generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy." Per Lord Ellenborough, C. J. in *Dudley v. Vaughan*, 1 Camp. N. P. C. 272. See *Bayly v. Schofield*, 1 Maule & Selwyn, 338.

(15) "The denial of the party must be with an intent to delay creditors; therefore being denied when sick in bed, or engaged in company, will not be an act of bankruptcy; and Lee, C. J. in *Field v. Bellamy*, H. 15 G. 2. was of this opinion, where the denial was by agreement in order to take out a commission. But in *Bramley v. Munde*, London Sittings, 2d June, 1756, Foster, J. held it sufficient proof of an act of bankruptcy: the fact proved was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff were) was denied to the plaintiff's clerk, who was sent to demand money: *tamen quære*, for how can such a denial be said to be with intent to delay the creditor? Probably the defendant himself, in this case, had concerted or been privy to the committing the act of bankruptcy: and under such circumstances a denial by agreement has in many cases been holden to be sufficient proof of an act of bankruptcy. For where a person has been assisting in procuring such act of bankruptcy to be committed, it does not afterwards lie in his mouth, nor shall he be permitted to say, it was fraudulent or ineffectual. But such act of bankruptcy will be of no avail against persons who were not privy to it." *Buller's Nisi Prius*, 39, 40. See also *Cawley v. Hopkins*, Co. B. L. "I doubt how far an act of bankruptcy committed by consent and agreement is valid, with respect to a third person not privy to such agreement. Certainly the bankrupt himself; and all those who come in under the commission are concluded to say any thing against it. But the relation of a commission of bankrupt to the time of committing the act, though useful to prevent frauds, is sufficiently hard already upon private persons; and ought not to be extended farther. An act of bankruptcy in the eye of the law is considered as a crime; but where is the crime of denying oneself to another by previous consent and agreement?" Per Lord Mansfield, C. J. in *Hooper v.*

this kind, the question had always been asked, whether or not the debtor was denied to the creditor. So in *Hawkes v. Saunders, Co.* B. L. 5th edit. p. 79. it was holden, that an order to be denied, without an actual denial, was not sufficient (16). But if the trader gives a general order to be denied and is denied to a creditor, it is sufficient, although the object of the trader was to be denied to another creditor, and not to the person who called.

The denial must be to a creditor who has a debt due to demand; a denial to the holder of a security payable at a future day will not be sufficient, although the security be such as may by statute 7 Geo. 1. c. 31. § 1, 2. be proved under the commission.

But denial to the holder of a bill, on the morning of the day on which it becomes due, is sufficient.

A. being in bad circumstances* on the evening of the 7th of January, expressed his fears to his clerk that he should not be able to pay a bill which would become payable the next day, and desired him to come earlier than usual the next morning, and be in the way, and in case the holder of that bill should inquire for him to deny him. The holder of the bill called the next morning before nine o'clock, and presented the bill for payment, when the clerk said, that his master was not at home. In the course of the day, A. appeared in public, and before five o'clock in the evening paid the bill. The judge directed the jury to find for the plaintiff, conceiving that the act of bankruptcy was complete by

t *Mucklow v. May*, 1 Taunt. 479.

x *Colkett v. Freeman*, 2 T. R. 59.

u *Ex parte Levi*, 7 Vin. Abr. 61. pl. 14.

Smith, 1 Bl. R. 442. In *Bamford v. Baron*, 2 T. R. 595. n. this opinion of Lord Mansfield was recognized by the court.

In a case where it appeared that the creditor, to whom the denial was supposed to have been given by the plaintiff's clerk, had only demanded payment of a debt, but had not asked to see the plaintiff personally, and that the clerk, supposed to give the denial, had no specific directions for giving it, it was holden that such denial did not amount to an act of bankruptcy. *Dudley v. Vaughan*, 1 Camp. N. P. C. 271.

(16) *S. P. Per Lee, C. J. in Jackman v. Nightingale*, Bull. N. P. 40. and that therefore it was necessary to prove that the person denied was a creditor. Lord Camden, C. J. held, that being denied to one who came on behalf of a creditor was not sufficient. *Green's B. L.* 39.

the denial of a creditor with intent to delay him. Several of the jury suggested, that, by the practice of merchants, the payer of a bill has the whole of the day on which it becomes due, till five o'clock to pay it in. However, upon the judge's repeating to them his opinion, the jury found for the plaintiff. A motion was made for a new trial on the ground suggested by the jury, and a question was raised, whether the bill-holder could be considered as a creditor until after the expiration of the time which, by the custom, the payer had to discharge it in; and it was contended also, that the creditor in this case, supposing him to be one then, could not be said to have been delayed, as he had been punctually paid in due time, and could not have protested the bill till after five o'clock. But the court approving the direction of the judge, refused to grant a rule.

3. "*Or otherwise absenting himself.*"

If a person, who has not a constant dwelling, absent himself from his usual abode¹ with design to defraud or delay his creditors, he shall be adjudged a bankrupt (17).

A trader having a counting house² (the only place in which he carried on business) in town, and a dwelling house in the country, departed from his counting house, to which he never afterwards returned, taking his books with him, and

y Com Dig Bankrupt (C. 1)

z *Judine v. Da Cossens*, 1 Bos. & Pul. N. R. 234.

(17) On the 28th of November, Hall rode out of town and returned in the evening, before which a bailiff had been at his shop to arrest him*: the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly, and this was held to be an act of bankruptcy within the statute 1 Jac. 1. c. 15. § 2.

A. being greatly indebted, gave orders that he should not be denied when his creditors called; several creditors called and A. saw them, and upon their asking for money he pretended to go out to get it, and left his house under that pretence, but did not return in the course of the evening. It was proved that during his absence he went either to the billiard table or a tavern. Lord Kenyon, C. J. was of opinion that these were acts of bankruptcy, as absenting himself for the purpose of delaying his creditors. *Bigg v. Spooner*, 2 Esp. N. P. C. 651.

* *Maylin and another v. Eyles*, London Sitings, Coram Raymond, C. J. Str. 809.

spent at his dwelling house a few nights, after which he finally quitted that also: it was holden that the trader, having departed from his counting house without any intention of returning, began to absent himself from the time of such departure, within the meaning of this clause, and thereby committed an act of bankruptcy at that time.

If a trader leave his house in order to avoid his creditors*, it will be an act of bankruptcy, although no creditor was thereby delayed.

Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home; held that this was an act of bankruptcy within the foregoing words, although it appeared that not only no creditor was delayed, but that none could possibly be delayed^b.

A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way to delay till dinner time. It was holden, that it was for the jury to consider whether he absented himself to delay a creditor: and this evidence warranted their conclusion that he did not^c. So, where he absented himself from his house, where his creditors were, to avoid irritation and harsh language^d,

See *Bateman v. Bailey*, post, Sect. IX. Evidence and Witnesses.

4, 5. Not any case of importance on these two members of this section in the statute.

6. "*Or yield himself to prison.*"

B. was arrested for 28/., and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition. Lord Talbot, C. held this an act of bankruptcy, but observed, that if there had not been an intention to delay

^a *Hammond v. Hincks*, 5 Esp. N. P.

C. 139. recognized in *Robertson v.*

Liddell, B. R. E. 48 G. 3. 9 East, 487.

^b *Chenoweth v. Hay*, 1 M. & S. 676.

^c *Vincent v. Prater*, 4 Taunt. 609.

^d *Ib.*

^e *Ex parte Barton*, 7 Vin. Abr. Tit. Cred. and Bank. 61. 62. pl. 15.

creditors, yielding himself to prison would not constitute an act of bankruptcy.

7. "*Or willingly or fraudulently procure himself to be arrested, or his goods, money, or chattels to be attached or sequestered.*"

It was said by Lord Mansfield, C. J. in *Clavey v. Hayley*, Cowp. 428. that the word "attachment," being coupled with "arrests and sequestrations," (18) shewed that the legislature meant that sort of attachment by which suits are commenced, and that they plainly had in view the customs of London, and other towns, where that species of process is made use of. Hence where a person executes a bond and warrant of attorney to confess judgment, either for a *bonâ fide* debt, or for a larger sum than is really due, and judgment is entered up accordingly, and the debtor's goods taken in execution, such execution is not an "attachment," and consequently is not an act of bankruptcy, within the meaning of this clause.

8. "*Or depart from his dwelling house.*"

To constitute this an act of bankruptcy, the intention of the debtor to delay his creditor, by departing from his dwelling house, is sufficient^b (19). But if the departure be

f *Harman v. Spottiswood*, Co. B. L. 5th edit. p. 100.

g *Clavey v. Hayley*, Cowp. 427.

h *Hammond v. Hincks*, 5 Esp. N. P. C. 139. *Robertson v. Liddell*, 9 East,

487. in which *Barnard v. Vaughan*, 8 T. R. 149. and *Fowler v. Padget*, 7 T. R. 509. as to construing the word "or" in this statute "and," were overruled.

(18) A sequestration in London is a method of proceeding in an action of debt, where the party cannot be found; in which case, upon the action being entered, the officer goes to the warehouse of the defendant where the goods are, and fixes a padlock on the door, and if the defendant does not put in bail in time, judgment is given against him, and his goods are sold in satisfaction.

(19). "If a trader leave his house, circumstances may shew that it was not for the purpose of absconding." Per Lord Mansfield, C. J. in *Worseley v. Demattos*, 1 Burr. 467. In *Lingood v. Eade*, 1 Atk. 196. Willes, C. J. was of opinion, that a person's absconding to avoid an attachment upon an award for the non-delivery of goods pursuant to the award, was not an act of bank-

not accompanied with such intent,* it is not an act of bankruptcy. Whether the departing from the dwelling house be accompanied with an intent to delay a creditor is a question of fact for the jury to decide upon all the circumstances^l.

9. "*Or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels.*"

If a trader, in contemplation of bankruptcy, in order to pay even a just and *bonâ fide* creditor, or one who by possibility may become a creditor (viz. a surety^k) assigns by deed allⁱ, or even a part (20) of his effects to such creditor, the deed is fraudulent, and consequently an act of bankruptcy within the meaning of this clause^m. And the same rule holds if the assignment be to some creditors, but in total exclusion of others. If all the creditors do not concur, the deed is fraudulent and an act of bankruptcyⁿ.

Hence where a conveyance by deed was made by A. a trader^o, of all his effects, as a security to B., who had agreed to become A.'s banker, and to answer his drafts, for the

i Aldridge v. Ireland, B.R. E. 24 G. 3. cited in Williams v. Nunn, 1 Taunt. 273. See Holroyd v. Whitehead, 3 Camp. N. P. C. 530. where this question was left to the jury by Gibbs, C. J.

k Hassels v. Simpson, Doug. 68. n.

l Worsley v. Demattos, 1 Burr. 467. Wilson v. Day, 2 Burr. 827.

m Ex parte Foord, cited by Lord Mansfield, in 1 Burr. 477. Kettle v. Hammond, Middlesex Sittings after H. 7 Geo. 3. Bull. N. P. 40.

n Eckhardt v. Wilson, 8 T. R. 140.

o Worsley v. Demattos, 1 Burr. 467.

ruptcy; because it was not within the words of the statute, which makes it an act of bankruptcy in a person to depart from his dwelling house in order to avoid the payment of a just debt only, and not the delivery of goods [pursuant to an award], for that is a duty only. Lord Hardwicke, Chr. declared that he thought the distinction taken by Willes, between absconding to avoid a debt and absconding to avoid a duty, a sound distinction, and well warranted by the words of the statute.

(20) It may be proper here to take notice of the case of Hooper v. Smith, 1 Bl. Rep. 442. where Lord Mansfield, C. J. took a distinction between a conveyance executed by a trader of all his effects, and a conveyance of part of his effects, and relied on the cases of Coek v. Goodfellow, 10 Mod. 489. and Small v. Oudley, 2 P. Wms. 437. as establishing this proposition, viz. that a trader might give a preference to one creditor by assigning to him a part only of his goods for the payment of part of his debt.

purpose of enabling him to carry on his trade, subject to a defeasance on his paying such sums as B. might advance, with a covenant that on failure in the performance of the conditions, B. should take possession of the effects; the conveyance was holden to be fraudulent, and an act of bankruptcy, although the transaction, as between the parties, was fair and for a good and valuable consideration: 1st, on the ground of A's remaining in possession (21) after the

It must be observed however, that this opinion, delivered by Lord Mansfield at *Nisi Prius*, can hardly be considered as an authority. First, because it is at variance with the sentiments expressed by his lordship on the same point, in delivering the judgment of the court in *Worseley v. Demattos*, 1 Burr. 478. The words of which report are these, "It has been argued, that after a resolution taken by a trader to commit an act of bankruptcy, the trader so resolving to become a bankrupt, might lawfully prefer a just creditor, by conveying part of his effects to satisfy that creditor's debt. It is not necessary to determine that question in this cause, for here the conveyance is of all, and therefore I will only say that no such proposition is yet established, much less in the extent whereto it has been urged." From the language of this report then it may be collected that the impression on Lord Mansfield's mind at that time was, that the same point, which in *Hooper v. Smith* he considered as settled, was not then established; and it is clear that the cases of *Cock v. Goodfellow*, and *Small v. Oudley*, (which are the only cases mentioned by Lord Mansfield in *Hooper v. Smith*), were fully within his contemplation when he delivered the opinion of the court in *Worseley v. Demattos*, because he has there stated those cases at great length.

2dly, If this point was not decided in *Cock v. Goodfellow*, and *Small v. Oudley*, it can hardly be considered as having been established in *Hooper v. Smith*, because, independently of that being a *nisi prius* decision, there was another point made in the case, viz. whether there was not a concerted act of bankruptcy; and it is not quite clear from the report, on which of these two points Lord Mansfield ultimately decided the case.

3dly, The opinion of Lord Mansfield in *Hooper v. Smith* is contradicted by subsequent decisions, viz. *Devon v. Watts*, B. R. Doug. 85. and *Linton v. Bartlet*, C. B. 3 Wils. 47. of which last case, though Lord Mansfield said, in *Rust v. Cooper*, Cowp. 632, 638. that it went further than any former case, yet he adds, that it was well and fully considered. See also *Morgan v. Horseman*, 3 Taunt. 243. where the doctrine laid down in *Linton v. Bartlet*, and *Rust v. Cooper*, was recognized by Sir J. Mansfield, C. J.

(21) The circumstance of the assignee of the effects not taking possession is only evidence of fraud, and consequently may be explained. Per Lord Mansfield, C. J. 1 Burr. 484.

execution of the deed, and thereby obtaining a false credit; and finally, on the ground of an undue preference having been given by the deed to B. contrary to the spirit of the bankrupt laws, which anxiously provide for an equal distribution of the estate of the bankrupt among all his creditors (22).

So, where a trader, being in distressed circumstances*, executed a deed of assignment of *all* his estate to *one* of his creditors, purporting to be a security for an unliquidated sum, without delivering any kind of possession, except giving a letter of attorney to his own clerk (who had before this transaction managed his affairs,) to collect debts, &c. the assignment was holden fraudulent on the ground of undue preference, and there not being any alteration of possession (23).

A trader finding his circumstances on the decline^q, executed at midnight a bill of sale of *all* his goods (with the exception of a few articles to the amount of about 100*l.*) to some favourite creditors, in trust to pay them their full debts, leaving other debts to the amount of 900*l.* unprovided for, and absconded the next morning; the deed was holden fraudulent, for the interest which was excepted in the assignment was too minute to make a difference.

It is to be observed, that the circumstance of the trader being at the time of the conveyance under arrest at the suit of the creditor, to whom the conveyance is made, will not vary the case^r.

In a case where a trader being in insolvent circumstances*, in consideration of a loan of 120*l.* without interest, assigned *one-third part* of all his effects to the lender, who was his

p *Wilson v. Day*, 2 Burr. 827.

r *Newton v. Chantler*, 7 East, 138.

q *Compton v. Bedford*, 1 Bl. R. 362.

s *Lintou v. Bartlet*, 3 Wils. 47.

London Sittings after H. T. 1762.

Lord Mansfield, C. J.

(22) The principle of all the cases is, that if the conveyance to a particular creditor *necessarily* prevents the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy. Per Le Blanc, J. in *Newton v. Chantler*, 7 East, 145.

(23) It is observable that in this and in the preceding case the deed was valid as between the parties, which circumstance was adverted to by Lord Mansfield in *Wilson v. Day*, where he said, that it was not necessary, that the deed should be fraudulent as between the parties; it was sufficient, if it was a fraud on the creditors generally.

brother, and within two days after the execution of the deed, the trader absconded; it was holden, that the bill of sale was fraudulent, on the ground of its being made in contemplation of bankruptcy, and its being partial and unjust to other creditors.

So where a trader, in insolvent circumstances^t, having an act of bankruptcy in contemplation, and being threatened with an attachment for non-payment of money under a decree of the Court of Chancery, voluntarily by deed assigned a lease, *part* of his estate, to three of his creditors, (one of whom had lent him money, and the other had indorsed notes for him,) as a security for the payment of these debts, and then in trust for himself; the deed was holden an act of bankruptcy, 1st, As a fraud upon the creditor under the decree, who might have claimed the benefit of the lease, notwithstanding the assignment was for a valuable consideration, on the authority of *Twynne's case*; and 2ndly, As being a voluntary preference contrary to the general policy of the bankrupt laws.

Where a trader, being arrested for debt by one creditor^u, executed a bill of sale to another creditor (who had been induced to give a bond for his appearance at the return of the writ) of all his effects, for the purpose of paying, in the first instance, the debts due to both the creditors, and afterwards the overplus, if any, to himself; and the creditor, to whom the bill of sale was executed, took possession of the effects the day after the execution of the deed, on which day the trader committed an act of bankruptcy by keeping house: it was holden, that the execution of the bill of sale was an act of bankruptcy.

A trader, being urged by the importunity of a creditor, executed a conveyance of lands in trust to sell, and to pay such creditor, with a further trust to pay debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy; it was holden, that the deed so executed was an act of bankruptcy^x.

A trader, knowing himself to be in insolvent circumstances^y, and being under arrest in execution at the suit of a creditor, executed a bill of sale of *all* his goods to the creditor, for the purpose of paying his debt, with a reservation of the surplus to himself; it was holden that this as-

^t *Devon v. Watts*, Doug. 85.

^u *Butcher v. Easto*, Doug. 294. See also *Law v. Skinner*, 2 Bl. R. 296. which is not inserted, because the

report was questioned in *Hassels v. Simpson*, Doug. 91, 92. n.

^x *Morgan v. Horseman*, 3 Taunt. 241. ^y *Newton v. Chantler*, B. R. H. 46 G 3. 7 East, 138.

signature, although executed under the compulsion of an arrest was fraudulent, and an act of bankruptcy; the necessary consequence of the deed being to prevent the bankrupt from carrying on trade, and thereby operating as an injury to the other creditors.

It must be observed, that it is not competent to the persons who have signed the fraudulent deed^a, and are privies to the transaction, to set it up as an act of bankruptcy. But where a commission of bankruptcy was sued out on a fraudulent deed, upon the petition of a creditor who had not concurred in such deed, but who was chosen assignee, together with other creditors who had concurred and were privy to the fraud; it was holden, that it was not any objection to an action brought by them as assignees for the recovery of part of the bankrupt's estate, that some of the assignees had concurred in the fraudulent deed, the petitioning creditor not having so concurred.

A. having contracted with a canal company to build works on the canal^b, as their engineer, purchased, with money advanced by the company, timber and other articles for that purpose, which were deposited on the premises of the company. Being considerably indebted, he borrowed of the company a further sum of money to pay his creditors the full amount of their debts, and as a security executed a bill of sale of his effects, which were then lying on the premises of the company, and delivered them by the delivery of a copper halfpenny. It was insisted, that the bill of sale was fraudulent, because the possession remained to all appearances the same after as before the conveyance, and the bankrupt continued to gain a false credit as the owner of the goods; but the court held, that possession of the goods having been delivered to the company at the time of the execution of the bill of sale, *as far as possession under these circumstances could be given*, the deed was not fraudulent.

A surrender of a copyhold estate to a creditor^c, for the purpose of giving an undue preference, is not an act of bankruptcy; because the conveyance necessary to constitute an act of bankruptcy must be such as would defeat or delay creditors at law, and the copyhold not being liable either to a *fi. fa.* or *elegit*, a creditor could not have obtained possession of it, if it had not been surrendered.

^a Bamford v. Baron, 2 T. R. 594. n. ^b Manton v. Moore, 7 T. R. 67.
^c Tappenden v. Burgess, 4 East's R. ^c Ex parte Cockshott, 5 Bro. Ch. C.
 230. Jackson v. Iwin, 9 Camp. N. 592.
 P. C. 49.

It has not as yet been decided that, where the conveyance by the trader of his effects is not by deed, such conveyance though fraudulent, is an act of bankruptcy. Indeed, it has frequently been asserted that it is not; by Lord Mansfield, *C. J.* and Aston, *J.* in *Martin v. Pewtress*, 4 Burr. 2477. 2480. 2482. and in *Rust v. Cooper*, Cowp. 633, 635. But such conveyance, though it does not amount to an act of bankruptcy, will be void by reason of the fraud. The leading cases on the subject are, *Alderson v. Temple*, 4 Burr. 2235.; *Martin v. Pewtress*, 4 Burr. 2477.; *Harman v. Fisher*, Cowp. 117.; and *Rust v. Cooper*, Cowp. 629. See also *Manton v. Moore*, 7 T. R. 71. where Lord Kenyon, *C. J.* took this distinction: A conveyance of goods without deed is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent, and an act of bankruptcy.

B. a bookseller^d, in September 1807, applied to the defendant, a pawnbroker, to discount three bills for him, which he had drawn upon *C.* and *D.* The defendant gave him cash for them, but soon after becoming suspicious of *B.*'s credit, he asked him, whether they were not accommodation bills: *B.* answered that they were. The defendant then required some security to be put into his hands, in case the bills should not be paid when they became due. In consequence of this application, *B.* at different times, between November and February, deposited with the defendant various parcels of books to the value of about 300*l.* for the purpose of being sold for his benefit, if the bills should not be duly honoured by the acceptors. These books were chiefly brought by *B.* in a hackney-coach in the evening. It likewise appeared that he had compounded with his creditors two or three years before, which circumstance must have been known to the defendant who had lent him money to pay the stipulated composition. *B.* committed an act of bankruptcy in the beginning of March, and the commission was sued out against him on the 17th of that month; the bills then remaining in the defendant's hands unsatisfied. It was contended on the part of the plaintiffs, that the defendant had unduly obtained possession of the books by a voluntary preference. *Lord Ellenborough*. "How is this a case of voluntary preference? The bankrupt parted with the books upon the defendant's importunity. The bills were not due, but the bankrupt was liable upon them, and the defendant had a right to ask for farther security. The defendant had not a right of action when the books were deposited with him; but the bills constituted a good petitioning creditor's

debt, and might have afforded him the means of compulsion. Strictly, only the acts of a trader subsequent to his bankruptcy are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws. The cases upon the subject have gone far and far enough, and I am not disposed to give them any extension. If the debt had been due here, the preference certainly would not have been fraudulent. It wants voluntariness in which the fraud consists. The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt upon the eve of bankruptcy made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of farther security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to bankruptcy can be set aside." Plaintiffs nonsuited. On a motion to set aside the nonsuit, the court were of opinion that the delivery of the goods did not constitute an act of voluntary preference, so as to render it fraudulent and void: that in order to constitute such voluntary preference, two things must concur; 1st. that the delivery should be voluntary on the part of the bankrupt; and, 2ndly, that at the time of such delivery, there should be a contemplation of bankruptcy. In the present case, the proposition for giving farther security came from the creditor and not from the bankrupt. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582. was cited as in point.

A creditor obtains a preference in contemplation of an intended deed of composition, which would be fraudulent against the creditors under that deed: the composition going off, the creditor may hold his securities against a commission of bankrupt subsequently issued, and not contemplated at the time of the preference^e.

Having stated the decisions which have been made upon the several acts of bankruptcy enumerated in the 13 Eliz. c. 7. § 1. and 1 Jac. 1. c. 15. § 2. I shall proceed to the consideration of such acts as are mentioned in the 21 Jac. 1. c. 19.

§ 2

^e *Wheelwright v. Jackson*, 5 Taunt. 100.

10. "*Obtaining either by himself, or others by his procurement; any protection other than such person as shall be lawfully protected by privilege of parliament.*"

Granting protections has fallen into disuse^f. According to Blackstone, the last instance which appears on our books is, a protection granted by King William in 1692^g. By stat. 7 Ann. c. 12. § 5. traders are declared not to be entitled to the protection given by that act to the servants of ambassadors and other public ministers.

11. "*Exhibiting to the king, or any of his courts, any petition or bill against his creditors, to compel them to accept less than their just debts, or to procure time.*"

These bills have been long exploded^h.

12. "*Or, being arrested for debt, shall after his arrest lie in prison two months or more, upon that or any other arrest or detention in prison for debt, shall be adjudged a bankrupt from the time of the first arrest.*"

The day on which the arrest is made is to be included in the reckoningⁱ; according to the rule, that, where the computation of time is to be made from an act done, as in this case from the arrest of the trader, the day when such act is done is to be included; and the months are lunar months. But if there is not a continuing imprisonment from the time of the arrest, then the intention of the legislature appears to have been that the two months should run only from the time of the party's going to prison, and not from the arrest. Hence where a trader was arrested for debt on the 4th of November^k, but allowed to go at large until the 8th, when he returned into custody, and being afterwards moved into the King's Bench prison, lay there upwards of two months, it was holden, that the act of bankruptcy which he thus committed, had reference only to the 8th

^f 3 Bl Comm 299.

^g See Barradale v. Ld. Cutts, 3 Lev

^h Per North, Ld. Keeper, in Ald. Blackwell's case, 1 Vern, 153.

ⁱ Glassington v. Rawlins, 3 East's R. 407.

^k Barnard v. Palmer, 1 Camp. N. P. C. 509.

when he returned into custody, and not to the 4th when the original arrest took place. So where a trader, being arrested, put in bail¹, and afterwards surrendered in discharge of his bail, and continued above two months in prison, it was holden, that he was a bankrupt only from the time of his surrender, not from the time of his arrest. But where sham bail was put in before a judge² as a means to get the trader turned over to the prison of the court, and he was accordingly surrendered and sent there, it was holden that the imprisonment was to be computed from the arrest; there being an unbroken imprisonment from the time of the arrest, and the bailing being considered as a mere form to turn the bankrupt over from one custody to another. So where the trader was sick in bed at the time of the arrest, and could not be immediately removed to prison³.

Although the trader is, during two months, in a progressive course of committing an act of bankruptcy⁴, yet the act of bankruptcy is not complete until the expiration of the two months, and consequently a commission cannot regularly issue until that time; for, in order to obtain it, there must be an affidavit that the party has committed an act of bankruptcy. The property of the bankrupt vests in the assignees by relation either from the time of the arrest⁵ or the going to prison, as the case may be.

13. "*Or being arrested for the sum of 100*l.* or more of just debt, shall, after such arrest, escape out of prison.*"

A. having been arrested for debt in Kent on the 31st of March⁶, was, on the 6th of May following, brought up by an *habeas corpus*, in order to be turned over; on the road to the judges' chambers, A. was permitted to call at an house in the city of London, and was carried thence to a judge's chamber to be bailed, and accordingly was bailed, but instantly there surrendered by his bail in discharge of themselves, and thereupon committed to the King's Bench prison, where he lay above two months. It was adjudged, that this passing through another county, by the permission of the sheriff, was not an escape within the meaning of this act.

¹ *Tribe v. Webber*, Willes, 464.
² in *Rose v. Green*, 1 Burr. 437. stated
 more fully post.
³ in *Stevens v. Jackson*, 4 Camp. 164.

⁴ *Gordon v. Wilkinson*, 8 T. R. 507.
⁵ *King v. Leith*, 2 T. R. 141.
⁶ *Rose v. Green*, 1 Burr. 437.

IV. *Of Property in the Possession of the Bankrupt as reputed Owner.*

By stat. 21 Jac. 1. c. 19. § 11. reciting, "that it often falls out that many persons, before they become bankrupts, convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own; it is enacted, "that if any "person, at such time as he shall become bankrupt, shall, "by the consent and permission of the *true owner and proprietary*, have in his *possession, order, and disposition*, any "goods or chattels, whereof he shall be *reputed owner*, and "take upon him the sale, alteration, or disposition, as owner, "the commissioners shall have power to dispose and sell the "same for the benefit of the creditors seeking relief under "the commission, as fully as any other part of the estate of "the bankrupt."

It was formerly a question whether the preamble did not restrain the enacting part of this section¹, and confine its operation to property, originally belonging to the bankrupt, and remaining in his possession after a conveyance of it to another; but it was adjudged in *Mace v. Cadell*, Cowp. 232. and post, p. 203, that it did not, and that it extended to the goods of other persons which are permitted to remain in the possession of the bankrupt, and whereof he may take upon himself the sale, alteration, or disposition as owner.

The general view of the provision now under consideration was to prevent traders from gaining a delusive credit, from a false appearance of their circumstances, to the misleading and deceit of those who should trade with them.

Choses in action fall within the description of goods and chattels mentioned in this clause².

Mortgages or sales upon condition of goods and chattels are within the statute, as well as absolute sales³; and a mortgage by one partner to another of a moiety of stock in trade is not distinguishable from a mortgage to a stranger, if the mortgagor is suffered to continue in possession as visible partner.

The principal difficulty in deciding questions on this statute

¹ Lord Hardwicke, in *Ryal v. Rolle*, 1 Atk. 122. was of opinion that the enacting part of the clause was restrained by the preamble. ² *Horn v. Baker*, 9 East, 239. S. P. ³ *Ryal v. Rolle*, 1 Vesey, 348. 1 Atk. 165. S. C. 1 Wils. 260. S. C.

lies in ascertaining, whether the bankrupt is reputed owner or not. When this fact is settled, the application of the statute is easy; for from the reputed ownership false credit arises; from that false credit arises the mischief, and to that mischief the remedy of the statute applies.

As it has been truly observed, that these questions have much more of fact in them than law" (24), I have ventured to state the decisions at considerable length; lest I should mislead the reader, arranging them under two divisions: first, cases within the statute; and, secondly, cases not within the statute.

1. *Cases within the Statute.*—21 Jac. 1. c. 19.—A trader being indebted to J. S., mortgaged to him certain leasehold estates and some hoys, but did not deliver possession of them, and afterwards the trader became a bankrupt. J. S. brought an ejectment and got possession of the leasehold estate, but the assignees took possession of the hoys. The leasehold not being sufficient to pay J. S. his principal and interest, he filed a bill to foreclose and to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees admitting the leasehold not sufficient to pay J. S. insisted on their right to the hoys under this clause of the statute, the bankrupt having possession, and acting as owner thereof until he was declared a bankrupt. Lord Talbot decreed, that the plaintiff should be at liberty to come in under the commission for his deficiency; dismissing the bill so far as it required account of the profits of the hoys, which were ordered to be sold for the benefit of the creditors in general. N. In *Hall v. Gurney*, Co. B. L. 5th edit. p. 342. Lord Mansfield, C. J. said, that in this case of *Stevens v. Sole*, there was a grand bill of sale which was delivered to the mortgagee.

So where the owner of nineteen two-and-thirtieth parts of a ship, then lying at Yarmouth, conveyed an interest in the same to the defendant, by way of mortgage, and delivered to him the grand bill of sale, but *continued in the manage-*

u Per Buller, J. in *Walker v. Burnell*, x *Stephens v. Sole*, cited 1 Atk. 170.
Doug. 310. recognized by Lawrence, y *Hall v. Gurney*, Co. B. L. 5th edit.
J. in *Horn v. Baker*, 48 G. 3. B. R. .p. 342.
9 East, 241.

(24) Hence, in cases of this kind, it seems proper to leave it to the jury to say, whether under the circumstances, the bankrupt had the reputed ownership of the goods at the time. See the remark of Lawrence, J. 9 East, 241.

ment of the ship, together with the other part-owners, and acted as visible part-owner from the time of the conveyance until he became a bankrupt; Lord Mansfield, on the authority of *Stevens v. Sole*, held that the defendant was not entitled to retain against the assignees. See *ex parte Standroom*, Co. B., L. p. , 1 Ves. jun. 163, and post.

So where A., a brewer, in partnership with B., mortgaged to C. in trust for B., his, viz. A.'s moiety of the utensils, stock in trade, debts, profits, &c. for securing a sum of money lent to him by B., but continued in possession of the stock, &c.; and received the debts as if in partnership with B., and afterwards became a bankrupt; it was holden by Lord Hardwicke, Ch. assisted by Burnet, J., Parker, C. B., and Lee, C. J., 1st. On the authority of the preceding case, of *Stevens v. Sole*, that a conveyance of goods and chattels, by way of mortgage, or with condition of redemption, was within the statute, and that the mortgagee or vendee upon condition was "true owner and proprietor," within the meaning of that statute. 2dly, That "goods and chattels" included debts; and in this case notice of the assignment of the debts to the partner not having been given, the assignees of the bankrupt were entitled to dispose of them for the benefit of the creditors in general. 3dly, That the mortgage to C. in trust for B. the partner, was not to be distinguished from a mortgage to a stranger, under the circumstance of this case, the trustee not having interfered. That if it had been intended to take the case out of the statute, B. when he became entitled to A.'s moiety, should have had the sole and not a joint possession only; that A. having continued in possession after the conveyance as visible partner, and received debts, &c. by the permission of B., had the order and disposition of the goods and chattels, and was one of the reputed owners as much as B.

* Another point was made*, whether B., by the loan to A. his partner, did not gain a special lien on A.'s moiety of the partnership effects; but it was determined that he had not any such lien, there not being any authority or precedent for it after a bankruptcy; and that it was a different consideration what a court of equity might do between the parties themselves, while both remained capable of transacting for themselves.

It was agreed by the court, in the preceding case, that mortgages of lands and fixtures were not affected by the statute;

and the same doctrine was laid down in *Horn v. Baker*, 9 East, 237. as to vats and stills belonging to a distillery, and which were fixed to the freehold.

In *trover* for a dier's plant^b, it appeared that the plaintiff had sold the plant to B. for which he gave the plaintiff two promissory notes, one payable in one year, and the other in two years from the time of the sale. At the expiration of the first year, B. finding it inconvenient to pay the note then due, by indenture agreed to assign and deliver the plant to plaintiff, in consideration of his delivering up the notes; but it was stipulated in the deed that A. should let the plant to B. for a term of years at a certain rent. B. covenanted to pay the rent quarterly, to keep the plant in repair, and not to assign it without the consent of the plaintiff. The deed contained a proviso that B. should deliver the plant, and that the plaintiff might take possession of the same on failure in the payment of the rent. There was a memorandum, also, that B. had put the plaintiff into possession by the delivery of one winch in the name of the whole. Afterwards B. became a bankrupt, and the defendant being chosen assignee, took possession of the plant as part of the effects of B. The court were of opinion, that this case was within the statute, and Lord Mansfield said that he had not any doubt that this was a new experiment to defeat the bankrupt laws. The law had said^c, that a trader could not mortgage his effects and at the same time keep possession. What was the case here? the bankrupt sold and kept possession, and paid interest for the money; if this contrivance were suffered, it would open a door to avoid the statutes, and, therefore, it ought not to be allowed to prevail.

So where B. kept a coffee-house^d, and a creditor, after taking in execution all the household furniture and other articles belonging to the coffee-house, let them by deed to B. for a term of years, who covenanted not to remove them without the creditor's consent; B. having continued in possession under this deed for several years, until the time of his bankruptcy, the assignees were holden to be entitled to the property under this statute, the bankrupt having had such a possession as necessarily created a reputation of ownership. The bankrupt being the reputed owner and appearing to have the order and disposition of the goods, the court considered him as having taken upon himself the sale, order, and disposition, within the meaning of this sta-

^b *Bryson v. Wylie*, B. R. H. 23 G. 3. ^c In *Ryal v. Rolle*, 1 Atk. 165.

^d 1 Bos. & Pul. 33. u.

^d *Lingham v. Biggs*, 1 Bos. & Pul. 32.

tute, which terms they observed were only incidental to reputed ownership.

Trover for goods*. It appeared that the defendants were bankers, to whom B, a mercer, resident in Cumberland, had given a warrant of attorney to secure certain advances which they had made to him. Judgment having been entered, a writ of *fi. fa.* was sued out thereon, and a warrant directed, on 7th May, to two of B.'s shopmen, there being no bound bailiffs in Cumberland. The shopmen were desired to take possession of all B.'s stock in trade under it. Having got the warrant they remained in the shop till night, when they locked it and carried away the key. But on the Monday morning they again opened it; and, although B. did not interfere, business was carried on apparently as usual. On the evening of this day, B. committed an act of bankruptcy. A commission of bankrupt was sued out against him on the 14th of the same month. The goods were afterwards sold by public auction under the warrant, the shopmen having remained in possession from the time it was delivered to them. *Ld. Ellenborough, C. J.*—How can the possession of the servants be adverse to that of their master? The goods were certainly under the "order, disposition, and control" of the bankrupt, when the bankruptcy happened, and therefore passed to his assignees notwithstanding the execution. I remember an execution in the North, where the warrant was delivered to a gentleman's butler who continued to serve up wine, and to wait at his master's table as before. The court has more than once expressed an opinion that there ought to be bound bailiffs in Cumberland as in other counties. They seem to have supposed here, that a possession, *aliene* to the master's, dissolved the relation between him and his servants; but they were wrong in point of law. Had they delivered the warrant on the 7th to a bound bailiff, and put him in possession, all would have been right.

A. a trader and an officer in the East India Company's service^f, assigned his privilege of shipping goods from the East Indies to England to B. for a valuable consideration; and in order to evade the by-laws of the East India Company, which prohibit such assignment, the goods were shipped, entered, warehoused, and sold by the Company in A.'s name, and the proceeds carried to his account; but before A. received those proceeds from the Company, he became a bankrupt. It was holden, that his assignees were entitled to

^e *Jackson v. Irwin*, 2 Camp N. P. C. ^f *Gordon v. E. I. Company*, 7 T. R. 49.

recover the amount in an action for money had and received, against the Company, this being such a possession as fell within the statute.

It has already been observed that the enacting part of the 11th section of the statute 21 Jac. 1. c. 19. now under consideration, is not restrained by the preamble, but that it extends to the goods of other persons remaining in the possession of the bankrupt, as well as those which were originally the bankrupt's property.

Hence, where it appeared that the plaintiff having kept a public-house^a, and had a licence, said she was married to one Penrice, whose name she afterwards entered in the books of the excise office, with a note in the margin "married," from which time Penrice had the licence, and continued in the possession of the house and goods until he committed an act of bankruptcy: the court were of opinion, that this case was within the statute, on two grounds; 1st. That the statute extended to the goods of other persons as well as to those which were originally the bankrupt's property. 2dly. That after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she should never be allowed to say that she was not married to him, and that the goods were her sole property.

So where household furniture, the separate property of the wife of B.^b and of her children by a former husband, were, upon her marriage with B., assigned to the plaintiffs, as trustees, in trust to suffer B. to enjoy them, on condition that he should pay the plaintiffs, for the use of the children of his wife by her former husband, a certain sum by yearly instalments; and, notwithstanding several defaults in payment of those instalments, the bankrupt was permitted by the trustees to remain in the possession of those goods, until the evening before he committed an act of bankruptcy, when they repossessed themselves of the goods: it was holden, that the trustees had suffered the bankrupt to have the possession, order, and disposition of the goods, *down to the time of his bankruptcy*, and therefore the case fell within the very words, as well as the meaning, of the statute. But the goods must be in the possession of the bankrupt *at the time of his bankruptcy*, otherwise the statute does not apply^c.

A., a termor for years of lands, had built thereon a recti-

^a Mace v. Cadell, Cowp. 232.

^b Darby and others v. Smith, 8 T.R.

32.

^c Jones v. Dwyer, 15 East, 21.

fying distil-house^k, where he carried on the business of a distiller in partnership with B. A. finding it to be a losing concern, withdrew from the business, and thereupon leased to B. (his former partner) and one C. the premises, together with the *stills, vats, and utensils*, proper for carrying on the business, and which had been used by A. and B. Under this lease B. and C. continued in possession of the property, carrying on the trade in the same manner as was done before, until they became bankrupts. It did not appear that there was any usage in the trade for letting such utensils. The question arising, whether the bankrupts, under the above-mentioned circumstances, had the reputed ownership of the moveable utensils of the trade before and at the time of the bankruptcy, and had thereby acquired the real ownership by the statute for the benefit of their creditors; the court were of opinion that they had; Ld. Ellenborough, C. J. observing, that "the true object of the statute was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appeared, were fixed to the freehold; and as such would not pass to the bankrupt's assignees, under the description of "goods and chattels" in the statute. But as to the vats and utensils, there was nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership, when the trade was carried on by A. and B. If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such an usage, there was nothing stated in the case which qualified the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners, ought to be

answerable for the consequences, and was so intended to be by the statute."

2. *Cases not within the Statute.*—First, this clause does not relate to goods which the bankrupt has in *auter droit*, as executor (25) or administrator.

Hence, where a trader married a woman who was in possession of goods as administratrix to her former husband, and afterwards became a bankrupt, it was holden by Lord Hardwicke, Ch. that this was not within the statute¹, because the administratrix had the goods in *auter droit*, and the husband could not have them in any better right, and therefore they were not liable to the debts of the second husband; for the meaning of the statute (if it was possible to put any meaning upon some clauses of this statute which were very darkly penned) was only with regard to goods which the bankrupt had in his own right.

Or as factor or trustee.—A trader in London having money of J. S.^m (who resided in Holland) in his hands, bought South Sea stock, as factor for J. S. and took the stock in his own name, but entered it in his account book as bought for J. S., after which the trader became bankrupt, it was holden by Lord Parker, that this stock was not liable to the bankruptcy (26).

1 Ex parte Marsh, 1 Atk. 159.

m Ex parte Chion, 3 P. Wms. 147. n.
(A)

(25) "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator, not even in money which can specifically be distinguished, and ascertained to belong to such testator, and not to the bankrupt himself." Per Lord Mansfield, 3 Burr. 1366. See also *ex parte* Ellis, 1 Atk. 101.

(26) Where a merchant consigns goods to a factor in London, who receives them, the factor, in this case being only a servant or agent for the merchant beyond sea, cannot have any property in such goods; neither will they be affected by the bankruptcy. Per Lord King, Ch. in *Godfrey v. Furzo*, 3 P. Wms. 186.

"This statute does not extend to the case of factors or goldsmiths who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell as his own." Per Lord Mansfield, delivering the opinion of the court in *Mace v. Cadell*, Cowp. 233. In *Horn v. Baker*, 9 East, 243. Lawrence, J., commenting on the preceding passage, observed that the last expression, viz. "that the goods must be such as the party suffers the trader to sell as his own," was evidently used in contra-

Goods in the possession of a factor^a, from the known nature of his employment, can *seldom* leave room for any question as to the purpose for which they are in his possession. But, with respect to another species of property, namely, bills of exchange or notes, the possession of these is more equivocal; for being generally looked upon as cash, and delivered or remitted to an agent or banker generally in that way, and upon a general account between the parties, they will be considered in that light; and, as being blended with the general mass of his property, will, in case of his becoming a bankrupt, pass by the assignment under the commission, *unless they appear to have been specifically appropriated to some particular purpose.*

It has been remarked with great propriety by Mr. Cullen, in his excellent treatise on the Principles of the Bankrupt Law, that what will amount to a specific appropriation is a question of fact, and therefore depends upon the various circumstances of each particular case. From the following cases the reader will be able to form a general idea of the nature of a specific appropriation and its limits.

A correspondent of the bankrupt^o, before his bankruptcy, drew bills on him, and desired him to place them to a *particular account*, in the name of a third person, distinguished from their general account by a *particular letter*, and which the bankrupt said he would do. The correspondent also drew other bills on other persons *to answer the former bills*, and remitted the latter for that purpose to the bankrupt, with directions to place these *to the same account*. The former bills, not having been paid by the bankrupt, were sent back protested, and paid by the correspondent; and the latter bills, which had been remitted to answer them, remained at the time of the bankruptcy in the possession of the bankrupt unnegotiated. This was holden to be a specific appropriation.—See also *ex parte* Oursell, Amb. 297.

In a case of bills remitted to B. a banker^p, after an account transmitted by him to C. his correspondent, on the balance of which account C. was indebted for bills accepted

^a Cullen's D. L. 295.

^p Ziuck v. Walker, Bl. R. 1154.

^o *Ex parte* Dunas, 1 Ves. 532. and
1 Atk. 232.

distinction to the case of factors, &c. who sold for other persons, and not for themselves. And he (Lord Mansfield) could not have meant to lay it down generally; for that, viz. the case of Mace v. Cadell, was not the case of a sale.

by B. and then outstanding) which C. had drawn upon B. under an agreement to make remittances to answer the same when due; the bills remitted to answer the acceptances (which were not paid by the banker, but by the correspondent himself after the bankruptcy of B.) were considered as in the nature of goods in the possession of a factor; and, therefore, that they belonged to the correspondent, subject to B. the banker's lien for the balance due to him at the time of the bankruptcy: and that, having been deposited by the bankrupt with another banker, who had set them short in the bankrupt's book, they were the same as if still in the possession of the bankrupt.

An agreement having been entered into by B.^r, a trader residing in London, to purchase of C., his correspondent at Manchester, all the light gold which should be sent by the latter from Manchester to London, and to accept bills at two months for the money due upon the sale, and to accept from time to time, other bills drawn by C. for his own convenience, but that in such case C. should remit value to the amount of such acceptances, to answer together with the light gold for the different bills so drawn: B. became a bankrupt, and C. being at the time of the bankruptcy considerably indebted upon the balance of the account, but ignorant of an act of bankruptcy committed, sent a quantity of light gold and some bills, in order to enable the bankrupt to pay his acceptances for him when they should become due. C. afterwards paid the amount of the bankrupt's acceptances for him to the holders, and claimed the gold and bills as against the assignees. There were no other accounts between the parties, but upon these dealings, which had been carried on in the manner stated for some years. This was held to be a specific appropriation, like the case of principal and factor, and the agreement was distinguished into different parts; of which, though the first was merely a contract for a bargain and sale; the latter part was considered as a contract, of which the effect was, that the bankrupt should become the banker of his correspondent and accept his bills, the latter remitting the value to the amount, in light gold and bills: and to which latter part of the contract, the other had no other relation than as incidentally ascertaining the rate at which the gold was to be taken.

The plaintiff, by letter, requested permission of B.^r to place in his hands bills which had a long time to run, and

q Took v. Hollingsworth, 5 T. R. 215. r Parke v. Ellison, 1 East's R. 544.
S. C. in error, 2 H. Bl. 501.

to be allowed to draw without renewals at shorter dates, and desired B. to calculate the sum to be drawn for, allowing commission. The bills of long date, endorsed by the plaintiff, were included in this letter; to which B. returned an answer, saying, that agreeably to the plaintiff's wishes he had *discounted* the bills, and then specified the amount for which the plaintiff might draw upon him as desired. The plaintiff drew bills accordingly on B. who accepted the same, but shortly afterwards became a bankrupt, and these acceptances were dishonoured. The bills received from the plaintiff remained in the hands of B. at the time of the bankruptcy, unnegotiated; but the assignees of B. possessed themselves of these bills, and received the amount of them. An action for money had and received having been brought by the plaintiff against the assignees, it was holden, that it would lie; for the application to the bankrupt was not to sell bills of long date for those of shorter date, but to *place* those long bills in the hands of the bankrupt upon condition of being allowed to draw short bills upon him; and, though in his answer he used the term *discount*, yet he assented to the terms of the first letter, and used that word merely as a mode of ascertaining what he was to receive for the accommodation. The bills, therefore, having been deposited upon a condition, and that condition not having been complied with, and they remaining in specie in the hands of the bankrupt at the time of the bankruptcy, the plaintiff might have brought trover for them against the assignees, but they having parted with the bills and received the value, this action for money had and received would well lie in lieu of trover to recover the bills.

A. and B. were bankers in Birmingham*, with whom the plaintiffs had opened a banking account, which was continued for some time, until A. and B. became bankrupts. A few days before the bankruptcy, the plaintiffs paid into the bank three bills, which were endorsed by them, but did not become due until a short time after the bankruptcy. At the time of the bankruptcy, a considerable balance was due to the plaintiffs upon their cash and bills (due) account, independently of the three bills in question. It was stated to be the practice of this and other banking-houses in the country, that when approved bills, not having a long time to run, were brought to them by a customer, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer, giving him either cash or liberty to draw upon them to that

amount. And the bankers so far considered these running bills (which were always indorsed by the customer) as their own, that they would pay them away to their customers in the usual course of business, or transmit them to their own correspondents in London; and interest was charged on both sides the account on such paper transactions: and if the interest turned out to be against the customer, the bankers also charged a certain commission. Differing in this respect from the practice of bankers in London, who upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the same page; which sums when received are carried forward in the usual cash column. In the present case, the assignees of the bankrupts, considering that the three bills in question had been entered in the bank books in common with cash, and that, by the usual mode of dealing, the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the plaintiffs on demand; and as they became due the assignees received the money from the acceptors, to the credit of the bankrupt's estate; for which the plaintiffs brought their action for money had and received. The court were of opinion, that the plaintiffs were entitled to recover; Ellenborough, C. J. observing, that every person who pays bills not then due into the hands of his banker, places them there as in the hands of his agents, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case: he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if over-drawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill indorsed, has not only a lien upon it, if his account be over-drawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be over-drawn; and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

It will be proper to remark^t, that, in order to make a specific appropriation of bills, there must be a lodging of a

^t Bent v. Puller, 5 T. R. 494

bill, for a bill; or at least, several bills deposited at once, as one entire transaction to answer some particular purpose; for, where A. and B. had a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other negotiable securities deposited by A. with B., and upon the bankruptcy of B. and C., A. was obliged to take up the bills received by him from B., whereby the balance of accounts was in favour of A.; it was holden, that A. could not maintain trover for the bills deposited by him with B., because it appeared that they were paid in on a general running account, and there was not any specific appropriation of them. This case may appear to clash with the preceding, but it will be observed, that the present case was a mutual exchange of securities, whereas the case of *Giles v. Perkins* was merely the case of a customer depositing bills with his banker.

A. B. C. and D. were partners in a banking house at Liverpool*, and C. and D. also carried on a separate mercantile concern in London. J. S. having accepted bills payable at the house of C. and D. employed A. B. C. and D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him for the purpose of enabling them so to do; A. B. C. and D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A. B. C. and D. to C. and D., upon the general account between the two houses, and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances; it was holden, 1st. that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A. B. C. and D.; held also, that it made no difference that one of the bills remitted did not arrive in London until after the bankruptcy of C. and D. though sent by A. B. C. and D. before the event.

The ground on which this decision proceeded, appears to have been this; that C. and D., notwithstanding their partnership with A. and B., were parties capable of acquiring a property in the bills in question, as capable as any third party; that they had acquired such property without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; C. and D. were therefore to be considered as third persons with whom the bills had been negotiated (27).

* *Bolton v. Puller*, 1 Bos. and Pul. 539.

(27) If A. deposits bills indorsed in blank with B. his banker,

A banker has a lien for the amount of his balance upon a cheque paid in by a customer on his running account^x.

Secondly, this statute does not extend to goods of which the bankrupt has merely a temporary custody (28).

As, where a trader having sold goods which were lying on a quay^y, it was agreed between him and the vendees, that the goods should be removed, and lodged in a warehouse until the vendees should give orders for the shipping the same off as opportunity offered, they having none at that time: and accordingly the trader caused the goods to be removed into a warehouse of his own for the purposes of this agreement. A few weeks after, the trader became a bankrupt, the goods still remaining in his warehouse. This was holden not to be within the statute: because it was a mere temporary custody of the goods, and it could not, with any propriety, be said that they were in the order, disposition, or power of the bankrupt.

Thirdly, the statute does not extend to those cases, where the property has been delivered to the vendee, as fully as the nature of such property will admit (29).

As where a trader having borrowed of the defendant a sum of money^z, gave him a bond for £1200, and on the same day, as a collateral security, assigned to him the bills of lading and policies of insurance of the cargo of a ship then at sea; the policies of insurance were indorsed to the de-

x Scott v. Franklin, 15 East, 429.

z Brown v. Heathcote, 1 Atk. 160.

y Ex parte Flynn, 1 Atk. 185.

to be received when due, and B. raises money upon them by pledging them with C. another banker, who is not acquainted with the circumstances under which the bills came into the hands of B., and afterwards B. becomes bankrupt; A. cannot maintain trover for the bills against C. *Collins v. Martin*, 1 Bos. & Pul. 648.

(28) "Contrary to the express words of the statute, factors have been excepted out of it for the sake of trade and merchandize." Per Lord Hardwicke, Ch. in *ex parte Dumas*, 1 Atk. 234. 1 Ves. 585. "By the course of trade bankers and factors must have the goods of other people in their possession, and therefore this does not hold out a false credit to the world." Per Buller, J. in *Bryson v. Wylie*, 1 Bos. and Pul. 84. n.

(29) See *Manton v. Moore*, 7 T. R. 67. and ante, p. 193. which though not decided on this statute, affords an useful illustration of the principle here insisted on.

defendant, but the bills of lading were not. The trader became a bankrupt, and a bill in equity was filed by the plaintiff, as his assignee for the goods, insisting on the circumstance of the defendant's not having been put in possession of them at the time. But Lord Hardwicke, Ch. was clearly of opinion, that the defendant was entitled to retain possession of every thing until his debt was satisfied, because, every thing which could shew a right to the cargo being delivered over to the defendant, the bankrupt could no longer be said to have the order and disposition of it: and, therefore, the case did not fall within the meaning of this statute.

So where a trader^a, being indebted to the defendant, in consideration of the defendant advancing him a further sum, agreed to assign the cargo of a ship then homeward bound, of which he had received letters of advice, and to deposit the policy of insurance on the goods in the hands of the defendant, and, as soon as the bills of lading were transmitted to him, to indorse and deliver the same over to the defendant. The policy and letters of advice were deposited with the defendant accordingly, and the bill of lading was indorsed over to him as soon as it arrived, but not till after an act of bankruptcy committed by the trader. On the arrival of the ship the goods were delivered to the defendant. Trover having been brought by the assignees of the bankrupt, it was holden, that the preceding case of *Brown v. Heathcote* applied strongly to the present, and, although in that case there was an *assignment* of the bill of lading, and here only an *agreement* to assign, yet that did not make any difference, as neither conveyed more than an equitable title.

A ship at sea was mortgaged, with a proviso^b, that the mortgagor should continue in possession until failure of payment of mortgage money on demand, and at the time of the execution of the mortgage deed, the grand bill (30) of sale was delivered. The mortgagor became bankrupt. On the arrival of the ship, the mortgagee took possession of it, but the assignees took it from him and sold it; it was holden, that

^a *Lemprier v. Pasley*, 2 T. R. 485.

^b *Atkinson v. Maling*, 2 T. R. 462.

(30) "It has been invariably holden, that the delivery of the grand bill of sale is equivalent to the delivery of the ship itself." Per Buller and Grose, Justices, 2 T. R. 465, 466. N. The mortgage deed in this case was executed, before the stat. 26 G. 3. c. 60. was passed. See *Moss v. Charnock*, 2 East, 402.

the mortgagee might maintain trover against the assignees, because, the ship being^a at sea at the time of the mortgage, the delivery of the grand bill of sale had sufficiently transferred the property.

So where A. on the 19th of August^c, having insured a ship (then lying in Dublin) for 12 months, the next day mortgaged it to B., and delivered to him all the deeds, &c. On the 11th of September following, the ship sailed for Cadiz: on the 18th of September, B. mortgaged the ship to C., and in March following, C. having notice of the arrival of the ship at Yarmouth, a few days after took possession of it. It was insisted on the part of the assignees of A., who had become a bankrupt, that B., under whom C. claimed, might have taken possession of the ship during the month the ship lay at Dublin; but it was holden, that the ship being in a foreign port, and the muniments having been delivered, there was a sufficient possession to take the case out of the statute, and that C. was entitled to the ship.

So where B. a trader deposited with A. a bill of sale of a sixteenth part of a ship^d, (not at sea) as security for money lent by A., and it did not appear, that the trader had acted as owner from the time of the deposit: Thurlow, Ch. held, that A. was entitled to the produce of the bill of sale against the assignees of B. who had become a bankrupt, because, in the case of assignments of shares of ships, this seemed to be the only way of delivering possession.

Fourthly, the statute does not apply to those cases where the bankrupt has possession of the goods for a special purpose only:

As where a bankrupt^e, after his certificate, and who traded again for himself, was left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors as part of the estate, it was holden, that such possession did not fall within the statute, so as to vest the goods in the assignees under a second commission, on the ground that the bankrupt had not the disposition so as to sell the goods, and that he was not the reputed owner. And Buller, J. said, that possession of the goods exposed for sale in a shop might be within the statute; but possession

^c *Ex parte Batson*, 3 Bro. Ch. C. 359. ^e *Walker v. Burnell*, Doug. 316. 3 T. Co. B. L. 5th edit. p. 345. R. 321. S. C.

^d *Ex parte Stadgroom*, 1 Vez. jun. 163. and Co. B. L. 5th edit. p. 348.

of the furniture in a house was no more evidence of a right to that furniture, than of a right to the house. And per Ashurst, J. the statute certainly does not extend to every case of possession, not, for instance, to the case of a ready furnished lodging.

So where trover being brought to recover the value of some timber^f, it appeared that the commissioners of the victualling-office, having occasion to erect a stage at Weevil, in Hampshire, for the purpose of rolling their barrels on board the shipping, published an advertisement for carpenters to deliver in proposals for doing the work. Forbes and his partners were disposed to undertake the business, and to deliver in their proposals: but, inasmuch as they were general merchants, and not carpenters, and as there might have been difficulties in making the contract in their own name, Kent, who was a carpenter, agreed with Forbes and Company, to make the contract in his name; and he was to have one-fourth of the clear profit, and a guinea a week for his superintendence, and Forbes and Company were to supply the timber, and to have the residue of the profits. The contract was accordingly made between the commissioners and Kent; and Forbes was one of Kent's sureties, which would not have been allowed (as Forbes knew) according to the usual mode of government contracts, had he been known to have had any concern in the contract, which Kent declared he had not. The timber was bought by Forbes and Company, and shipped by them in their own name, to be sent to the yard at Weevil, where it was delivered as for Kent's use, and received by the King's officers as such, and they swore they should not have received it on account of any other person; *but that they should not have permitted even Kent to dispose of it in any other manner than for the work contracted for*, except such parts of it as were found unfit for the intended purpose, *because they considered it as delivered for the purpose of the contract.* Kent had informed the agent-victualler, that Forbes was the real contractor, but that was a secret between those persons. Before the work was finished, Kent became a bankrupt, on which Forbes got possession of the timber, to recover which the present action was brought, on a supposition that the bankrupt's creditors were entitled to it, under the 21 Jac. 1. c. 19.

It was holden, that this case did not fall within the sta-

tute (31) on these grounds, that there never was any sale of the timber to Kent, nor any *general delivery so as to give him the absolute disposition of it*; for the storekeepers would not have permitted even Kent to have sold the timber to any other person, unless any part of it had been unfit to be used in performing the contract, as they considered that it was delivered only for the purpose of the contract. Therefore there could not be any danger that Kent's creditors would be induced to trust him on the credit of that property, or as supposing it liable to their debts; that the possession which he had was somewhat similar to that of a carpenter, who receives timber to convert it into a waggon; or of a taylor, to whom cloth is sent for the purpose of being worked up (32). And that it was a very different case from that of a person making a sale of any part of his property, and yet continuing in possession and taking upon him the disposition of it with the consent of the vendee; for in such case, as the *property was originally his* and there never was any visible alteration in it, it was a snare to induce persons to give him credit, to which the vendee, by his neglect to obtain the possession, lends his assistance, as he concurs in giving a false appearance to the transaction. But in this case, the timber came into Kent's possession in the natural course of the transaction, in which there was not any fraud either actual or constructive; for it appeared by the evidence, that the timber was originally sold to the defendants on their own account, and that the vendor did not know that the bankrupt had any concern in the transaction.

Where, by agreement between B. and the defendant, B. agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, B. should be allowed to remain in possession for 3 months without paying rent; which

(31) "With regard to the case of *Collins v. Forbes*, I was by no means satisfied with the decision; it struck me, that when the timber was delivered to the officers of government in Kent's name, and for his use, he had the possession, and order, and disposition of it; but the court proceeded on this ground, that the bankrupt had possession of the goods for a *special purpose* only, and had not the order and disposition of them." Per Lawrence, J. in *Gordon v. East India Company*, 7 T. R. 237.

(32) See the remark of Mr. Cullen, tending to impeach the authority of *Collins v. Forbes*. *Principles of the Bankrupt Laws* by Cullen, p. 318. n. (106).

agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and B. afterwards left in possession according to the agreement, who became a bankrupt whilst he so remained in possession, and before the expiration of the 3 months; held that this was not a possession by the bankrupt within the stat. 21 Jac. 1. c. 19. s. 11.

Lastly, the possession which a husband^b, living with his wife, has of the separate property of the wife, settled before marriage in trust for her separate use, is not sufficient to bring a case within the statutes; and it will not be any objection to such a settlement, that the goods were not described in the deed, or referred to in a schedule annexed. It is observable, however, that if stock in trade is thus settled on the wife, for the purpose of enabling her to carry on a separate trade, if the husband intermeddles in such trade, the property will be liable to his debts.

V. Of Payments made to and by Bankrupts, protected by Statutes.

By the act of bankruptcy, all the real and personal estate of the bankrupt is vested in the assignees by relation, from the time of the act committed. The legal effect of an act of bankruptcy is to enable the assignees, when a commission is sued out, to rescind all contracts made by the bankrupt after the act of bankruptcy. This relation takes place in all cases except three, which are provided for by the statutes 1 Jac. 1. c. 15. s. 14.—21 Jac. 1. c. 19. s. 14.—and 19 G. 2. c. 32. s. 1.

Of Payments to Bankrupts protected by Statute.—By stat. 1 Jac. 1. c. 15. s. 14, it is provided, "that no debtor of the bankrupt shall be endangered for the payment of his debt, truly and bona fide to any such bankrupt before such time as he shall understand or know that he is become a bankrupt."

Without this protecting provision, a bona fide payment made to a bankrupt, would not have prevented the assignees from recovering the same debt. It must be observed, that

^g Muller v. Moss, 1 M. and S. 335.

^h Jerman v. Woolloston, 2 T. R. 618.

this provision does not extend to payments made voluntarily with knowledge of an act of bankruptcy¹, which is followed up by a commission. But where there has not been any commission, or any docket struck², or any intention to sue out a commission, if a trader brings an action against his creditor for a debt due, it will not be any defence to say, that the plaintiff has committed an act of bankruptcy, of which the defendant had notice; for in such case, if the plaintiff recover, and the defendant pays the debt, the payment, having been enforced by coercion of law, will be valid against the assignees, in case any commission should afterwards be taken out. So where two partners have stopped payment, and a commission of bankrupt is taken out against one of them, a debtor of the firm, although he has notice of the stoppage, cannot refuse to pay money due to them³.

A factor gave his acceptance to his principal^m for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; it was holden that the payment was protected by the statute.

By stat. 21 Jac. 1. c. 19. s. 14. "no purchaser for a good and valuable consideration shall be impeached by virtue of this act or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt be sued forth against such bankrupt within five years after he shall become a bankrupt."

But by stat. 46 Geo. 3. c. 135. s. 1. [22d July, 1806,] it is enacted, "That in all cases of commissions of bankruptcy thereafter to be issued, all conveyances by, all payments by, and to, and all contracts and other dealings and transactions (33) by and with any bankrupt, *bonâ fide* made or

¹ Vernon v. Hankey, 2 T. R. 113.

² Foster v. Allanson, 2 T. R. 479.

³ Prickett v. Down, 3 Camp. N. P. C.

131.

^m Wilkins v. Casey, 7 T. R. 711. See

also Coles v. Robins, 3 Camp. N. P.

C. 153. S. P.

(33) Trover for goods. The goods in question were taken in execution by the defendants on the 7th of July last; and it was proved that the bankrupt had committed an act of bankruptcy in the May preceding, but that the commission was not sued out against him till the 1st of October following. The goods were sold on the 20th of July, and on the 30th of the same month the money was paid over to the person at whose suit they were taken in execution. For the defendants, it was contended, that this case

" entered into more than two calendar months before the
 " date of such commission, shall, notwithstanding any prior
 " act of bankruptcy committed by such bankrupt, be good,
 " provided the person so dealing with such bankrupt had
 " not at the time of such conveyance, &c. notice of any
 " prior act of bankruptcy having been committed by such
 " bankrupt, or that he was insolvent, or had stopped pay-
 " ment." And by s. 2. " In all cases of commission of
 " bankrupt thereafter to be issued, every person with whom
 " the bankrupt shall have really and *bonâ fide* contracted
 " any debt before the date and suing forth of such commis-
 " sion, which, if contracted before any act of bankruptcy
 " committed, might have been proved under any such com-
 " mission, shall, notwithstanding any prior act of bankruptcy,
 " be admitted to prove such debt, and to be a creditor under
 " such commission, in like manner as if no such prior act of
 " bankruptcy had been committed, provided such creditor
 " had not, at the time of the debt being contracted, notice of
 " any prior act of bankruptcy." And by s. 3. " in all cases
 " in which, under commissions of bankrupt thereafter to be
 " issued, it shall appear that there has been mutual credit
 " given by the bankrupt and any other person, or mutual
 " debts between the bankrupt and any other person; one
 " debt or demand may be set off against another, notwith-
 " standing any prior act of bankruptcy committed by such
 " bankrupt before the credit was given to, or the debt was
 " contracted by such bankrupt, in like manner as if such
 " prior act of bankruptcy had been committed; provided
 " such credit was given to the bankrupt two calendar
 " months before the date and suing forth of such commis-
 " sion, and provided the person claiming the benefit of such
 " set-off had not at the time of giving such credit notice of
 " any prior act of bankruptcy, or that such bankrupt was
 " insolvent or had stopped payment." And by the same
 " section it is provided, "that the issuing of a commission,
 " although it shall afterwards be superseded, or *the striking*

was within this section; but per Lord Ellenborough, C. J. " There
 is no pretence for calling this a payment by the bankrupt, and the
 meaning of the word *transactions* must be determined by the words
 used along with it, viz., "contracts and other dealings." The
 *transactions protected by this clause of the statute are evidently
 transactions between the parties in the ordinary course of business,
 not transactions carried on through the medium of legal process."
 The plaintiffs had a verdict for the produce of the goods allowing
 for the expenses of the sales, but not for the sheriff's poundage.
 Blogg v. Phillips, 2 Camp. N. P. C. 129.

" of a docket for the purpose of issuing a commission, whether any commission shall have actually issued thereupon or not, shall be deemed notice" of a prior act of bankruptcy for the purposes of this act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission or striking such docket." And by s. 4. " All persons against whom any commission of bankrupt shall thereafter issue, and who shall be duly found bankrupts under the same, shall, upon obtaining their certificate, be discharged from all debts by this act made proveable under such commission, and shall have the benefit of the several statutes now in force against bankrupts, in like manner as if such secret acts of bankruptcy had not been committed prior to the contracting such debts." And by s. 5. " No commission of bankrupt, thereafter issued, shall be avoided by reason of any act of bankruptcy having been committed, by the person against whom such commission shall have issued, prior to the contracting the debt of the creditor, upon whose petition such commission shall have issued, if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt to him was contracted."

Notwithstanding this last section, it is still necessary, in order to support a commission of bankrupt, that there should have been a good petitioning creditor's debt subsisting at the time when the act of bankruptcy was committed; and it is not sufficient that the petitioning creditor's debt accrued before the suing out of the commission.

By stat. 49 G. 3. c. 121. (20th June, 1809,) s. 2. it is enacted, " that in all cases of commissions of bankrupt hereafter to be issued, all executions and attachments against the lands and tenements, or goods and chattels of the bankrupt, *bonâ fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed; provided the person, at whose suit such execution or attachment shall have issued, had not at the time of executing or levying the same any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment. Provided always, that

n Not proof. *R. v. Bullock*, 1 Taunton's R. 71. This member of the clause, which declares that striking a docket shall be notice of a prior

act of bankruptcy, has been repealed by stat. 49 G. 3. c. 121. s. 1. *Moss v. Smith*; 1 Camp. N. P. C. 499.

“ the issuing of a commission of bankrupt, although such
 “ commission shall afterwards be superseded, shall be deemed
 “ such notice, if it should appear that an act of bankruptcy
 “ had been actually committed at the time of issuing such
 “ commission.”

Of Payments by Bankrupts protected by Statute.—The next object of consideration is the stat. 19 Geo. 2, c. 39, s. 1. Before this statute, when an act of bankruptcy had been committed, and a commission had issued in consequence of it, the property of the bankrupt was by relation to the act of bankruptcy so vested in the assignees, that any payment made by the bankrupt after the act of bankruptcy, was void as against creditors, however fairly such payment might have been made, and without any regard to its being a voluntary or compulsory payment. In order to avoid the inconveniencies arising from too rigid an observance of this principle, when trade became more extensive, the stat. 19 G. 2. was made, whereby, after reciting the frequent commission of secret acts of bankruptcy, unknown to creditors, and other persons with whom the bankrupts had dealings in trade, and their continuing afterwards to appear publicly and carry on their trade by buying and selling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if they were solvent persons, and further reciting the discouragement to trade and prejudice to credit, from permitting payments to be defeated in the cases and under the circumstances above-mentioned, it is enacted, “ that no real and *bonâ fide* creditor
 “ of any bankrupt, for or in respect of goods really and *bonâ fide* sold to such bankrupt, or for or in respect of any bills
 “ of exchange really and *bonâ fide* drawn, negotiated, or accepted by such bankrupt, in the usual and ordinary course
 “ of trade and dealing, shall be liable to repay to the assignees of such bankrupt's estate, any money which before
 “ the suing forth such commission was really and *bonâ fide*
 “ and in the *usual and ordinary course of trade and dealing*,
 “ received by such person of any such bankrupt, before such
 “ time as the person receiving the same shall know, under-

p Money received in respect of bills of exchange not yet due cannot be considered as received by the creditor in the usual and ordinary course of trade and dealing. The payments protected are payments upon bills actually due. *Tamplin v. Digging*, 3 Camp. N. P. C. 312. *Semb.* that accommodation bills are not bills which can be said to have been drawn in the usual course of trade and dealing within the meaning of this statute, S. C. See farther on this subject, *Holroyd v. Whitehead*, 3 Camp. N. P. C. 530.

" stand, or have notice, that he is become a bankrupt, or that
 " he is in insolvent circumstances (34)."

A payment under an arrest^d, has been construed to be a payment in the usual and ordinary course of trade and dealing, and consequently within the protection of this act.

The bankrupt was indebted to Morgan by the acceptance of a bill of exchange. The bill not being paid, M. commenced an action against the bankrupt, and employed a sheriff's officer to arrest him. The bankrupt upon being arrested, paid the amount of the bill. Neither M. nor any one concerned for him personally knew that the bankrupt had committed an act of bankruptcy, or that he was in insolvent circumstances. The majority of the judges in the Court of Common Pleas, viz. Heath and Rooke, J. held this a good payment within the statute. Chambre, J. thought otherwise (35).

q *Cox v. Morgan*, 2 Bos. & Pul. 398. Per Heath and Rooke, Js., Chambre, J. dissent. See also the cases there cited of *Calvert v. Lingard*, and *Holmes v. Wennington*, establishing the same point, and *esp. Farr*, 9 Ves. 513.

(34) Different opinions have been entertained in respect of the manner of construing this statute. It was said by Chambre, J. in *Cox v. Morgan*, 2 Bos. & Pul. 407, that as all the other bankrupt laws are remedial, and as the act in question, by giving a preference to a particular class of creditors, trenches upon the great leading principle of those laws, viz. the securing the property for equal distribution, therefore it was not peculiarly entitled to have its operation extended by construction. But in the same case, p. 412. Heath, J. is reported to have said, that this had always been considered as a remedial statute, and as such was entitled to a liberal construction. So Lord Kenyon, C. J. in *Bradley v. Clark*, 5 T. R. 200. said, that it was a remedial law, and that effect ought to be given to it as far as the words would warrant. See *Ellenborough, C. J. in Hovil v. Browning*, 7 East, 154.

(35) In *Harwood v. Lomas*, 11 East, 127, the question arose whether a payment of a promissory note by a bankrupt, under an apprehension of process of execution issuing against him, upon judgment obtained on the note, was a payment in the usual and ordinary course of trade and dealing within the statute. The court inclined to think that it was not, but did not give any decisive opinion on this point, holding the payment not to be protected, on the ground, that it did not appear in the special case, that the note (even supposing it to be comprehended under the term bill of exchange in the statute) had been drawn and negotiated in the usual and ordinary course of trade and dealing. It seems, that whether the note had been so drawn, &c. was a question of fact which the jury ought to have found.

But where the bankrupt being in prison^r, sent for a certain number of his creditors and paid them, omitting *one*, at whose suit also he was charged in custody; this was holden to be a case of undue preference, and the payment thus made not within the protection of the statute.

A bill of exchange had been drawn on the bankrupt^s, who, when it became due, requested time of the holder (the defendant Hall) saying, it was not convenient to pay it at that time, but promising to pay interest for it, if the defendant would permit it to remain in his (the bankrupt's) hands, and afterwards, without notice of the bankruptcy, the defendant on application received payment of the bill: the court were clearly of opinion, that this was not such a payment in the ordinary course of business as came within the provision of the statute, on the ground, that the transaction amounted to a loan of money at interest, which became a debt.

So where money had been paid by a trader^t, after a secret act of bankruptcy, to a carrier, for the carriage of the trader's goods, it was holden, that the payment was not within the statute, which was confined to payments made for goods, and payments of bills of exchange.

So where A. obtained a verdict for a sum of money against B.^u, who afterwards committed an act of bankruptcy; A. instead of entering up judgment and taking out execution, consented to take a bill for the amount, drawn by B. on C. his debtor, which bill, when it became due, was duly paid by C., it was holden, that this payment was not protected by the statute.

A trader, after a secret act of bankruptcy^x, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader, after which the factor sold the goods and received the money; it was holden, that this case did not fall within the provisions either of the 1 Jac. 1. c. 15. s. 14. or the 19 G. 2. c. 32. s. 1. and that the factor was answerable to the assignees for the value of the goods.

A trader, being indebted to A. for goods sold and delivered, committed a secret act of bankruptcy^y: after which A. with-

^r Southey v. Butler, 3 Bos. & Pul. 237.

^s Vernon and others, assignees of Tyler v. Hall, 2 T. R. 648.

^t Bradley v. Clark, 5 T. R. 197.

^u Pinkerton v. Marshall, 2 H. Bl. 334.

^x Copland v. Stein, 8 T. R. 199.

^y Hovill v. Browning, B. R. H. 46 G. 3. 7 East, 154.

out the knowledge of the bankrupt, by the custom of London, attached money belonging to the bankrupt in the hands of his debtor, and received the same from the debtor in consequence of a judgment obtained against him in the foreign attachment. It did not appear, that the bankrupt knew that this money was in the hands of his debtor; it was holden, that this payment *by the debtor* was not protected by stat. 19 G. 2. c. 32. for that statute extends only to payments *by the bankrupt*.

VI. Of Actions which may be brought by the Assignees of a Bankrupt, and in what manner they ought to sue.

1. *Money had and received*.—An action for money had and received will lie against a creditor of the bankrupt*, who after the act of bankruptcy, takes out execution against the goods of the bankrupt, and receives from the sheriff the money arising from the sale of the goods; for the law supposes the creditor to have received the same for the use of the assignees, in whom the property of the goods is vested, and thence implies a promise to pay.

So where a trader became a bankrupt by lying in prison two months after an arrest*, it was holden, that his assignees might maintain an action for money had and received against a person, who, after the arrest, and before the expiration of the two months, having had notice that a commission would be sued out against the trader, sold his goods, and paid him the produce (36).

* *Kitchin v. Campbell*, 3 Wils. 304. * *King v. Leith*, 2 T. R. 141.
and Bl. Rep. 827.

(36) In cases of this kind the assignees have an election to bring either trover or assumpsit. In trover they may recover the full value of the goods at the time they were taken, though the sale may not actually have produced more than half their worth; but in assumpsit, the assignees considering the party selling the goods as their agent, are entitled to recover only what was produced by the sale of the goods. Per *Grose and Buller, J.* in *King v. Leith*, 2 T. R. 144, 145. If the assignees bring assumpsit they affirm the

By the law of England, if not contradicted by the laws of the country where the property may be, the commissioners may dispose of the personal property of the bankrupt resident here, although such property be in a foreign country. Hence where the defendant being resident in England, and a creditor of the bankrupt in England, after the assignment of the bankrupt's estate, and with full knowledge thereof, attached and afterwards received, by a remittance, money due to the bankrupt in Rhode Island in North America; it was holden, that the assignees might recover the same from the defendant, in an action for money had and received to their use.

So where after an act of bankruptcy committed, but before the assignment, a creditor of the bankrupt in England, and resident in England, with knowledge of the act of bankruptcy, made an affidavit of debt in England, by virtue of which he attached, and after the assignment received, money due to the bankrupt in one of the British plantations in America; it was holden, that the assignees might recover the same in an action for money had and received.

A. after an act of bankruptcy committed by B., received the amount of a draft drawn by B. on his banker in favour of A., for a *bona fide* debt. The plaintiffs, as assignees of B., brought an action against the banker for a larger sum of money belonging to the bankrupt, in which action the banker attempted to set off the before-mentioned sum, which he had paid to A.: but it appearing that the banker had paid the money to A. with full knowledge of the bankruptcy, the set-off was disallowed. The plaintiffs then brought an action for money had and received against A. to recover the amount of the draft, but it was holden, that the action would not lie; for, although the plaintiffs had at first an election whether they would bring the action against the banker or

b Hunter v. Potts, B.R. H. 31 Geo. 3. d Vernon v. Hankey, 2 T. R. 119.
 4 T. R. 192. (37). e Vernon v. Hanson, 2 T. R. 287.
 c Mill v. Worwick, 1 H. Bl. 665.

contract, and the defendant, if a creditor of the bankrupt, may set off his debt, Smith v. Hodson, 4 T. R. 211. But the assignees cannot affirm the act of the bankrupt as their agent in part, and avoid it as to the rest, Wilson v. Poulter, Str. 859.

(37) The authority of this case was confirmed by the decision in Phillips v. Hunter, on error in Exchequer Chamber, Hil. 35 Geo. 3. Eyre. C. J. dissentient, 2 H. Bl. 402.

A., yet having in the former action, against the banker, insisted that the money had not been paid on their account, and that it was void, they could not in the present action be permitted to contradict it, and insist that the payment was made on their account.

Covenant.—In covenant for rent on an indenture^f brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*; for the assignees succeed to all the rights of the bankrupt, and consequently may claim the benefit of that estoppel, which would have operated between the lessor and lessee.

Debt.—The assignees of a bankrupt may bring an action of debt on the stat. 9 Ann. c. 14. against the winner^g for money lost at play by the bankrupt before his bankruptcy.

Trover.—If after an act of bankruptcy but before commission, a person sue out execution against the goods of the bankrupt, under which the sheriff makes a seizure, and then a commission issues, and afterwards the sheriff sells the goods, the assignees may maintain trover against the sheriff^h, but not trespassⁱ, for officers and ministers of justice cannot be made trespassers by relation.

In like manner the assignees may bring trover against the party suing^k, if proved a party to the conversion by giving bond to the sheriff, and receiving the money levied (38).

Or if the party accompany the officer in levying the goods^l, though the produce of the goods remain in the hands of the sheriff's broker.

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant^m, and the time of the defendant's complying with the requisites of the registry acts of the 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. § 16. though such requisites were completed after the act of bankruptcy, and before the action brought, yet

f Parker v. Manning, 7 T. R. 557.

g Brandon v. Pate, 2 H. Bl. 368.

h Cooper v. Chitty, 1 Burr. 20, and 1 Bl. Rep. 65.

i Smith v. Milles, 1 T. R. 475.

k Rush v. Baker, Bull. N. P. 41. Str. 996. and MSS. S. C.

l Menham v. Edmonson, 1 Bos. & Pul. 369.

m Moss v. Charnock, 2 East's R. 399.

(38) "As to the conversion by the defendant, the evidence is as strong as can be; the bond proves that he ordered the execution, and the money paid to him shews who had the produce of the goods." Per Cur. S. C. MSS.

the property does not pass, and the assignees may maintain trover for the ship.

If a trader has been a bankrupt twiceⁿ, and obtained his certificate under both commissions, but has not paid a dividend of 15s. in the pound under the last; although the future estate of such bankrupt remain liable to the claims of his individual creditors; under the second commission, not having received 15s. in the pound, which they may respectively sue for as in other cases, yet this will not prevent the vesting of the bankrupt's estate in the assignees under a third commission for the benefit of all the creditors, and such assignees may sue for and recover the same.

Where S. obtained bills of exchange from the defendant upon a fraudulent representation, that a security given by him to the defendant, (which was void,) was an ample security, and, on the next day, having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills, (except one which had been discounted,) and also two bank notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against S., the assignees under which commission brought trover against the defendant for the bills and bank notes: held that the defendant was entitled to retain them^o.

In what Manner the Assignees ought to sue.—In actions brought by the assignees, they may declare generally as assignees of the estate of A. a bankrupt, according to the form of the statutes concerning bankrupts, without setting forth the act by which the trader became a bankrupt^p, or the proceedings under the commission^q.

A new assignee may in his own name maintain an action upon a judgment^r, obtained by a former assignee, who has been displaced by the chancellor.

A declaration on a *scire facias*^s, by the assignees of a bankrupt, stating generally, that he became a bankrupt within the meaning of the statutes, and that his goods and effects were duly assigned to the plaintiffs, is sufficient, without stating the trading, act of bankruptcy, &c. because a *scire facias* is an action.

ⁿ Havil v. Browning, 7 East, 154.

^o Gladstone v. Hadwen, 1 M & S. 517.

See farther Taylor v. Plumer, 3 M. & S. 562.

^p Pepys v. Low, Carth. 29.

^q Lawson v. Lamb, Lutw. 274.

^r De Cossou v. Vaughan, 10 East, 61.

^s Winter v. Kretschman, 2 T. R. 45.

The assignees cannot make themselves parties to the record in any intermediate stage of the proceedings¹, but it must be immediately after judgment, and before any other proceeding has taken place, though an interlocutory judgment is sufficient for this purpose. Hence where plaintiff after judgment against him *and* writ of error allowed, comes a bankrupt, the assignees ought to go on with the writ of error in the bankrupt's name, the writ of error being a proceeding after the judgment; and if the assignees, instead of adopting this method, sue out a *sci. fa.* in their own names to compel an assignment of errors, the court will quash it.

If the assignees bring an action upon a contract made by the bankrupt before his bankruptcy, it is incumbent on them to sue as assignees, and so to state themselves in the declaration.

But where the contract is made by the bankrupt after his bankruptcy², and before he has obtained his certificate, as all his property is then vested in the assignees, he will be considered as their agent; and, in such case, it is not necessary that they should state themselves to be assignees in the declaration (39); in like manner as where an executor brings action on a contract made *by himself* respecting the goods of the testator, he need not name himself executor.

In actions of assumpsit brought by the assignees on contracts made with the bankrupt, there are two ways in which the promises may be laid in the declaration; 1st, As having been made to the bankrupt³ before his bankruptcy (40); and, 2dly, As having been made to the plaintiffs as assignees⁴.

¹ Kretchman v. Beyer, 1 T. R. 463.

² Evans v. Mann, Cowp. 569. *

³ Rig v. Wilmer, Str. 697. adjudged on demurrer to declaration.

⁴ Fashion v. Dormet, 7 Vin. Abr. 140.

Tit. Creditor and Bankrupt, pl. 16.

(39) "Nor is it necessary that the assignees should give evidence of the trading, act of bankruptcy, &c." Per Ashhurst, J. in *Evans v. Mann*, Cowp. 570.

(40) It is most usual in practice to state the promises to have been made to the bankrupt, and this form is best adapted to actions on promissory notes given to the bankrupt. Sometimes to declarations drawn in this form, where the fact requires it, counts are added for money had and received to the use of the assignees, and upon an account stated with the assignees, with promises to the assignees.

In an action brought by the assignees of a bankrupt^a, the plaintiffs declared on an account stated *with the bankrupt*, whereon the defendant was found in arrear £ , and being so in arrear, he promised to pay the plaintiffs as assignees. On the general issue pleaded, the evidence was, that the account was stated with the bankrupt, and the defendant promised to pay him, but there was not any evidence of a promise to the assignees. Lord Hardwicke, C. J. was of opinion, that the declaration was supported by the evidence, and the plaintiffs had a verdict. On a motion for a new trial, the court concurred in opinion with the chief justice; Lee, J. observing, that he was not aware of any case, where, on a declaration framed in this manner, it had been holden necessary to prove an express promise to the assignees; because when the account was proved to be stated with the bankrupt, there was a sufficient consideration: a debt was created to the bankrupt which was transferred to the assignees by the statute; and this was evidence of a promise to the assignees so as to entitle them to this demand, standing in the place of the bankrupt.

The plaintiffs, in their original writ, described themselves as assignees of A.^a, and also as assignees of B., there not being any joint commission against the two, and declared in several counts for goods sold and delivered *by both the bankrupts, and also for goods sold by each of the bankrupts*. A verdict was found for the plaintiffs, and the damages were assessed severally on the separate counts. On a motion in arrest of judgment, the court were of opinion that the assignees might recover as much as the bankrupts themselves might jointly have recovered; therefore as the damages were assessed severally, they might enter up their judgment on the count for the joint-demand (41).

Agreeably to this determination, where the plaintiffs sued^b as assignees of A. and B., and also as assignees of C., for a joint demand due to all the bankrupts, the declaration was holden good on motion in arrest of judgment.

^a Skinner v. Rebow, T. 8 & 9 G. 2 B. R. MSS.

C. J. in De Cisson v. Vaughan, 10 East, 65

^a Hancock v. Haywood, 3 T. R. 433. recognized by Lord Ellenborough,

^b Streatfield v. Halliday, 3 T. R. 779. See Scott v. Franklin, 15 East, 428.

(41) If the verdict had been entered generally, the judgment must have been arrested: because the court were clearly of opinion that the counts for the separate demands were improperly joined.

The assignees under a joint commission against A. and B. in suing on a separate contract entered into with A., may describe themselves generally as assignees of A., without noticing the name of B.^c.

Actions against Assignees.—Formerly when a dividend was declared, it was considered that a right of action against the assignees accrued to every creditor for his proportion^d, and it was holden that assumpsit might be maintained against the assignees of a bankrupt by a creditor for his share of a dividend, under an order of the commissioners (42); and in such action the proceedings before the commissioners were conclusive evidence of the debt (43), and the assignees could not set off a debt due from the plaintiff, for the sum proved must be taken to be the balance due; but now, by stat. 49 G. 3. c. 121. s. 12. no action shall be brought by any creditor who has proved any debt under any commission of bankrupt, against the assignees of the estate of such bankrupt, for the amount of any dividend declared by the commissioners: but in cases of refusal by the assignees to pay such dividend, the creditor entitled to the same may petition the Ld. Chancellor, Ld. Keeper, or Lords Commissioners for the custody of the Great Seal, who, on hearing such petition, may not only order the payment of such dividend, but also in all cases in which it shall appear that the justice of the case shall require it, may order payment of interest for the time that such dividend shall have been withheld, and of the costs of the application.

A certificated bankrupt cannot maintain assumpsit^e against his assignees for his allowance under stat. 5 G. 2. c. 30. s. 7. (his estate having paid 10s. in the pound) if it appear that his certificate was not allowed before payment of the dividends.

c Stonehouse v. De Silva, 3 Campb. 399. d Brown v. Bullen, Doug. 407. per Kenyon, C. J. 6 T. R. 549. S. P.
e Groome v. Potts, 6 T. R. 548.

(42) After a debt is liquidated before the commissioners, it cannot be litigated, but by an application to the great seal. Per Cur. Doug. 409.

(43) The only way to question the proof of the debt taken by the commissioners is by petition to the chancellor. Per Lord Mansfield, C. J. Doug. 408.

BANKRUPT.

CH. Of Actions by the Bankrupt.

An uncertificated bankrupt has a special property in goods acquired by himself after his bankruptcy, and may maintain trover for them against strangers.

So if an order for the delivery of goods, belonging to A., but in the possession of B., be given by A. to an uncertificated bankrupt, in payment of a debt due from A. to the bankrupt after his bankruptcy, and B. refuses to deliver the goods, the bankrupt may maintain trover against him (11).

In cases of this kind, however, the bankrupt can recover only where the assignees do not interfere^b, for the general assignment of personal property by the commissioners in the first instance passes all the future acquired as well as present personal property, and a second assignment of personal property coming to the bankrupt is not necessary; consequently the superior title of the assignees must prevail where they come forward, and assert it.

To an action on a promissory note^f, and for money lent, the defendant pleaded that the plaintiff was an uncertificated bankrupt, whose effects had been duly assigned by the commissioners under a general assignment, comprehending in terms the future as well as present personal property of the plaintiff, and that the assignees had required the defendant to pay to them the money claimed by the plaintiff. Replication, that the causes of action had accrued after the plaintiff became bankrupt, and that the defendant, at the time of the contract, treated with the plaintiff as a person capable of receiving credit in that behalf, and that the commissioners had not at any time since assigned to the assignees, or any other person, the promissory note or money mentioned to be lent. On demurrer, it was holden, that the replication was bad for the reasons before mentioned.

^f Webb v. Fox, 7 T. R. 391.

^g Fowler v. Down, 1 Bos. & Pul. 44.

^h Kitchen v. Bartlett, 7 East's R. 53.

ⁱ Ib.

(14) These cases proceeded on this ground, that an uncertificated bankrupt has a special property in the goods in his possession subsequent to the bankruptcy; but notwithstanding these decisions, to assumpsit by several partners, the defendant may plead in bar the bankruptcy of one of them. Eckhardt and others v. Wilson, 8 T. R. 140.

An uncertificated bankrupt may maintain an action for work and labour done after his bankruptcy* (45).

If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour^l.

Where a commission of bankrupt is taken out fraudulently or maliciously^m, the chancellor may under the stat. 5 Geo. 2. c. 30. s. 23. assign the bond (given by the petitioning creditor) to the bankrupt, so as to enable him to recover the whole penalty of the bond. N. The assignment of the bond by the chancellor is conclusive evidence of the fraud or malice in an action brought on such bond, and it is not necessary to state in the declaration that the commission was fraudulently or maliciously sued out.

See further on this point, *Smithy v. Edmonson*, 3 East's R. 22.

VIII. *Of the Pleadings.*

1. *Of the general Plea of Bankruptcy under Stat. 5 Geo. 2. c. 30. s. 7.*—By stat. 5 Geo. 2. c. 30. s. 7. “If any bankrupt is afterwards impleaded, for any debt due before such time as he became a bankrupt, he may plead in general; that the cause of such action or suit accrued before such

k *Chippendale v. Tomlinson*, Co. B. L. 1 Colles v. Barrow, 4 Taunt. 774.
5th edit. p. 431. m *Smith v. Broomhead*, 7 T. R. 300.

(45) So for work and labour, and *materials found*, incident and necessary to the labour, *Silk v. Osborne*, 1 Esp. N. P. C. 140. So for money lent and advanced, as it will be presumed that the money may have been earned by his labour. *Evans v. Brown*, 1 Esp. N. P. C. 170.

Lord Ellenborough, C. J. speaking of *Chippendale v. Tomlinson*, and the cases which have been decided on its authority, said*, that the hardship of the case might perhaps have warped the opinion of the judges, when the evil might have been better remedied by statute, but now there was an inveterate practice of above twenty years in support of that series of cases.

* In *Kitchen v. Bartsch*, 7 East's R. 62.

"time as he became a bankrupt, and may give the special matter in evidence; and the certificate and allowance thereof shall be sufficient evidence of the trading, bankruptcy, commission, and other matters precedent to such certificate and a verdict shall thereupon be given for the defendant, unless the plaintiff can prove the certificate obtained unfairly and by fraud or can make appear any concealment by the bankrupt to the value of 10l."

This general plea of bankruptcy, if pleaded in the Court of King's Bench, does not require the signature of counsel^m; but by the practice of the Common Pleas it ought to be signed by a serjeantⁿ, otherwise it may be treated as a nullity.

It is sufficient for the defendant under the preceding statute to pursue the words of it, and to aver, that the cause of action accrued before he became a bankrupt; without averring, that the defendant had conformed according to the bankrupt statutes^o, or that the defendant became a bankrupt before the commencement of the suit^p.

By a certificate obtained under a joint commission, separate as well as joint debts are discharged^q. In like manner, by a certificate obtained under a separate commission, joint debts, as well as separate debts, are discharged^r. Formerly, indeed, doubts were entertained whether a certificate under a separate commission, against one partner, would not discharge the other partner; and, therefore, it was held necessary to provide against such discharge by stat. 10 Ann. c. 15. by the 3d section of which it is enacted and declared, "that partners, joint obligors, and joint contractors, with a bankrupt who has been discharged, shall remain liable, as if the bankrupt had never been discharged."

This general plea of bankruptcy may be supported by evidence of a certificate allowed after bill filed, and before plea pleaded^s, the cause of action having accrued before the bankruptcy; but the certificate cannot be given in evidence under the general issue, for the debt still exists, and as the certificate only operates as a special discharge from it under the statute, the defendant must avail himself of this discharge in manner prescribed by the statute^t.

^m Leigh v. t. v. Montaigne, 6 T. R. 496.

ⁿ Pitcher v. Martin, 3 Bos. & Pul. 171.

^o William v. Giordani, Co. B. L. 5th

edit. p. 518. in which Paris v. Salk-

eld, 2 Wils. 139 was overruled.

^p Tower v. Cameron, 6 East, 413.

^q Howard v. Poole, Str. 995. Dav.

431. S. C. Wickes v. Strahan, Str.

1157. S. P. Horsey's case, 3 P.

Wms. 23.

^r Exp. Yale, 3 P. Wms. 24. n.

^s Harris v. James, 9 East, 82.

^t Gowland v. Warren, 1 Camp N. P.

C. 265.

But the certificate will operate as a discharge^a of such debts only as are due at the time when the act of bankruptcy is committed (46). Debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms, and debts not due at the time of the act of bankruptcy, except in the cases specially provided for by particular statutes, are not affected by the commission.

Hence where a debt accrues after an act of bankruptcy and before the issuing of the commission², the bankrupt will remain liable, although he has obtained his certificate, and cannot avail himself of the general plea of bankruptcy.

A debt due on a judgment signed in an action for damages after an act of bankruptcy committed by defendant, and a commission issued thereon, is not discharged by the certificate, though the verdict was obtained before the bankruptcy³. So a bankruptcy of plaintiff occurring after verdict for the defendant, and before judgment, the subsequent certificate is no bar to an execution for the costs of the action⁴.

But if the acceptor of a bill of exchange not due become bankrupt⁵, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and consequently if the acceptor afterwards obtain his certificate, he will be discharged from the debt.

Before the stat. 19 Geo. 3. c. 121. a debt for which a person was merely liable as surety, but which was not paid until after the bankruptcy of the principal, was not proveable under the commission, and consequently was not barred

^a Bamford v. Buycell, 2 Bos. & Pul. 1. ² Walker v. Barnes, 5 Taunt. 778. 1
x S. C. Marsh 246 S. C.

³ Buss v. Gilbert, 2 M. & S. 70. ⁴ Joseph v. Orme, 2 Bos. and Pul. N. R. 180.

(46) But if an action be commenced against a bankrupt after the bankruptcy, for a debt due before the bankruptcy, and a verdict found for the plaintiff, and afterwards the bankrupt obtains his certificate; the costs of such action, as well as the original debt, are proveable under the commission. Willet v. Pringle, 2 Bos. & Pul. N. R. 190. The costs bear relation to the original debt; hence where plaintiff before the bankruptcy of the defendant, sued him for a debt, and went on with the suit after such bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was nonprossed, and costs of nonpross in error awarded against him, it was holden, that the certificate discharged defendant from these costs. Scott v. Ambrose, 3 M. & S. 326.

by the certificate^b, but now by the 8th section of that statute it is enacted, "that where at the time of issuing the "commission any person shall be surety for, or be liable for "any debt of the bankrupt, it shall be lawful for such "surety or person liable^c, if he shall have paid the debt, or "any part thereof in discharge of the whole debt, although "he may have paid the same after the commission shall "have issued, and the creditor shall have proved his "debt under the commission, to stand in the place of the "creditor as to the dividends upon such proof, and when "the creditor shall not have proved under the commission, "it shall be lawful for such surety, or person liable, to "prove his demand in respect of such payment as a debt "under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such "commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an "act of bankruptcy had been committed by such bankrupt, "provided that such person had not at the time when he "became such surety, or when he so became liable for the "debt of such bankrupt, notice of any act of bankruptcy, "or that he was insolvent, or had stopped payment; provided that the issuing a commission of bankruptcy, although "such commission shall afterwards be superseded, shall be "deemed such notice; and every person against whom any "such commission of bankruptcy has been or shall be awarded, "and who has obtained or shall obtain his certificate, shall "be discharged of all demands at the suit of every such person having so paid, or being hereby enabled to prove, or "to stand in the place of such creditor, with regard to his "debt in respect of such suretyship or liability, in like "manner to all intents and purposes as if such person had "been a creditor before the bankruptcy for the whole of "the debt in respect of which he was surety or was so liable."

The plaintiff accepted a bill of exchange^d, payable at a future day, for the accommodation of the defendant. Afterwards and before the bill became due, the defendant committed an act of bankruptcy. The bill was dishonoured. A commission issued, but was shortly afterwards superseded. A meeting of the defendant's creditors was then

b Chilton v. Wiffin, 3 Wils. 13. Young v. Buckley, 3 Wils. 246. 2 Bl. R. 899. S. C. Vanderheyden v. De Paiba, 3 Wils. 528.

c See exp. Lobhon, 17 Ves. 334. and exp. Lloyd, lb. 345. d Stedman v. Martinnant, 13 East. 497.

held; and time was given him. The plaintiff then accepted another bill for the purpose of taking up the former dishonoured bill, including also interest and stamp. This last bill was indorsed by J. S. as an additional security to the holders, who required it. Afterwards an effectual commission issued upon the original act of bankruptcy, under which the defendant obtained his certificate. The plaintiff at a subsequent day, when the second bill became due, paid it. It was holden, that the giving of the second acceptance for the prior debt did not discharge the original debt for which the plaintiff had become surety before the act of bankruptcy; and in paying that second bill the plaintiff was only paying the same debt which he was liable to pay as surety for the defendant upon the first bill; and consequently that this was a case within the preceding section of the stat. 49 G. 3, c. 121. by which the surety for a debt proveable under a commission, though not paid by him until after the issuing of the commission, shall stand in the place of the original creditor as to the whole of the debt so paid. The act, however, provided, that it should not extend to a person who, when he became surety, had either notice in fact of the act of bankruptcy committed, or implied notice from the issuing of the commission, though such commission were afterwards superseded. But the plaintiff's case did not fall within this proviso, for his suretyship had commenced before the issuing of the commission, afterwards superseded. The debt was not affected with the implied notice: it was a debt, therefore, proveable under the commission, and was consequently barred by the certificate.

The plea of bankruptcy is not a plea to the action, but a personal discharge only; hence, where an action of assumpsit was brought against A. and B. jointly as partners, and A. pleaded a judgment recovered, and B. pleaded his bankruptcy, and thereupon the plaintiff entered a *nolle prosequi* as to B.; it was holden that the plea of bankruptcy only discharged B., and farther, that the entry of the *nolle prosequi* as to B. did not discharge the action as to A.; for it was not like a *retraxit*, which is a total relinquishment of the suit.

Where the plaintiff's demand rests in damages, and cannot be ascertained without the intervention of a jury, it cannot be proved under the defendant's commission. Hence bankruptcy is not any plea in bar to an action of trespass

for mesne profits, because the damages are uncertain^k. Nor to an action of trover, though the conversion happened before the bankruptcy^l. Nor can the bankruptcy of the lessee be pleaded in bar to an action of covenant brought against him, for rent arrear, subsequent to his bankruptcy¹.

But now by stat. 49 G. 3. c. 121. (20th June, 1809) s. 19. it is enacted, "That in all cases, in which a commission of
"bankrupt shall be sued forth against any person, after the
"passing of this act, and such person shall be entitled to
"any lease or agreement for a lease, and the assignees shall
"accept the same, and the benefit therefrom, as part of the
"bankrupt's estate, the bankrupt shall not be liable to pay
"the rent accruing due after such acceptance of the same,
"nor shall he be liable to be in any manner sued in respect
"of any subsequent non-observance or non-performance of
"the conditions, covenants, or agreements therein contained:
"provided that the lessor or person agreeing to make such
"lease, his heirs, executors, administrators, or assigns, may
"(if the assignees shall decline, upon their being required
"so to do, to determine whether they will or will not so
"accept such lease or agreement for a lease) apply by petition
"to the Lord Chancellor, Lord Keeper, or Lords
"Commissioners of the Great Seal, praying that they may
"either so accept the same, or deliver up the lease or agreement
"for the lease, and the possession of the premises,
"who shall thereupon make such order as shall seem meet
"and just, and which shall be binding on all parties."

If a lessee covenants not to assign and becomes bankrupt, and his assignees take to the lease, his covenant is discharged by the foregoing section, although a breach of it had become impossible, by reason that he no longer had the subject matter respecting which the covenant was made. And therefore if he comes in again as assignee of his assignees, he shall not be charged with this covenant, and it is no breach if he assigns^k.

In assumpsit on a promise to pay plaintiff a certain sum per week for the support of an illegitimate child the plaintiff had had by the defendant, bankruptcy having been pleaded, Lord Ellenborough held, that as to any arrears which had accrued before the bankruptcy, the bankruptcy would operate as a discharge, but as no proof of subsequent arrears would have been admitted under the commission, the defendant was liable for such arrears.

g Goodtitle v. North, Dong. 583.

h Parker v. Norton, 6 T. R. 695.

i Auriol v. Mills, 4 T. R. 94.

k Doe d. Cheere v. Smith, 5 Taunt. 795.

l Miller v. Whettenbury, 1 Camp. N. P. C. 429.

B. sold a ship to A., with a covenant that he had a good title, though in fact he had none^m; afterwards B. became a bankrupt, and A. sustained damages by paying the value of the ship to the true owner; it was holden in an action on the covenant by A. against B., stating the special damage, that B.'s certificate was no bar.

This plea of bankruptcyⁿ will not avail a person against whom a second commission of bankruptcy has issued, unless he has paid 15s. in the pound under that commission, although the creditor who sues him has signed the certificate; for, by stat. 5 Geo. 2. c. 30. s. 9. (the first statute which provides for the case of a second bankruptcy) the *person* only of the bankrupt is protected, if his effects are not sufficient to make a dividend of 15s. in the pound. It must appear affirmatively that the estate has produced 15s. in the pound; evidence that it will probably produce so much^o is not sufficient.

If a defendant rely on a certificate under a second commission of bankruptcy^p under which he has not paid 15s. in the pound, it will be sufficient for the plaintiff, in order to deprive him of the benefit of it, to produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, act of bankruptcy, and other facts, which are necessary to support the commission as against third persons.

An action against a bankrupt^q, who has obtained his certificate under a second commission, on a cause of action accruing before his second bankruptcy, may be maintained, before a dividend has been made, or the period for making it allowed by stat. 5 Geo. 2. c. 30. s. 37. is elapsed, if evidence be adduced to shew, that it is not probable from the state of the effects in the hands of the assignees that the bankrupt will be able to pay 15s. in the pound.

The proving a debt under a commission issued against a person who had before compounded with his creditors, and whose estate under the commission had not nor would produce 15s. in the pound; but who, before he became a bankrupt, paid the creditors with whom he compounded the full amount of their debts, was held to discharge the bankrupt in respect of his future estate and effects from an action for the debt so proved^r.

^m *Hammond v. Toulmin*, 7 T. R. 612.
ⁿ *Philpott v. Corden*, 5 T. R. 287.

Thornton v. Dallas, Doug. 46.

^o *Coverly v. Morley*, 16 East, 225.

^p *Haviland v. Cook*, 5 T. R. 655.
J. Esp. N. P. C. 195.

^q *Jelfs v. Ballard*, 1 Bos. & Pul. 467.

^r *Read v. Sowerby*, 3 M. & S. 74

Evidence of the Plea of Bankruptcy.—The only evidence required to support the general plea of bankruptcy is the production of the certificate allowed by the chancellor^a; but the creditor may avoid the certificate by shewing that it was obtained unfairly and by fraud^b; as, if some of the creditors have been induced by money, or notes for money, having been given to them by a confidential friend of the bankrupt, to sign the certificate, the certificate is void, whether the bankrupt knew of the money having been given or not^c.

The certificate will not be a bar, if the creditor can shew a concealment to the value of 10*l.*, but on the other hand, the bankrupt may shew that the concealment was not wilful or fraudulent^d.

By stat. 5 Geo. 2. c. 30. s. 12. the bankrupt shall not avail himself of the certificate in the following cases.

1. "If upon the marriage of any of his children he shall have given above the value of 100*l.* unless he shall prove by his books or otherwise, upon oath, before the commissioners, that he had at the time, over and above the value so given, sufficient to pay all his creditors their debts:"

2. "Or if he shall have lost in any one day, at any game, or by having a share in the stakes or betting on either side, the value of five pounds, or 100*l.* in the whole, within *twelve months* next preceding the bankruptcy" (47):

3. "Or if within *one year* before he became a bankrupt he shall have lost 100*l.* by any contract, with respect to any stock of any company or corporation, or any parts of any public funds or securities, where the contract was not to be performed within one week from the making such contract; or where the stock was not actually transferred or delivered in pursuance of the contract."

The preceding clauses, being penal, are construed strictly.

The certificate is void, if signature of one of the creditors has been obtained by a promise from the bankrupt to pay that creditor his whole debt^e.

^a See the statute.

^b *Robson v. Calke*, Doug. 228.

^c *Holland v. Palmer*, 1 Bos. & Pul. 95.

^d *Cathcart v. Blackwood*, D. P. 26

Feb. 1763.

^e *Phillips v. Dicus*, 15 East, 248.

(47) Insuring in the lottery is not gaming within the meaning of this clause, *Lewis v. Piercy*, 1 H. Bl. 29. Nor keeping a lottery office. *Ex parte Richardson*, Co. B. L. 5th edit. p. 468.

By stat. 49 G. 3. c. 121. s. 6. it is enacted, " That after
 " Jan. 1, 1810, if assignees (who are indebted to the estate of
 " the bankrupt in 100*l*. or upwards in respect of money come
 " to their hands as assignees, and wilfully retained or employ-
 " ed by them for their own benefit) shall become bankrupt,
 " the certificate which may be obtained by them shall only
 " have the effect of freeing the person from arrest and impris-
 " sonment, but the future effects of such assignees shall re-
 " main liable for so much of their debt to the estate of the
 " bankrupt, as shall not be paid by dividends under their
 " commission, with interest; (tools of trade, necessary house-
 " hold goods and furniture, and necessary wearing apparel of
 " bankrupt and wife and children excepted).

And by the 11th section of the same statute it is enacted,
 " That after the 20th June, 1809, it shall not be lawful for
 " any creditor, who has or shall have brought any action, or
 " instituted any suit against any bankrupt in respect of any
 " demand which arose prior to the bankruptcy, or which
 " might have been proved as a debt under the commission,
 " to prove a debt under such commission for any purpose
 " whatever, or to have the claim of a debt entered upon the
 " proceedings under such commission, without relinquish-
 " ing such action or suit, and all benefit from the same^a; and
 " that the proving or so claiming a debt under a commission,
 " by any creditor, shall be deemed an election by such credi-
 " tor, *to take the benefit of such commission* with respect to
 " the debt so proved or claimed by him; provided always,
 " that such creditor shall not be liable to the payment, to the
 " bankrupt or his assignees, of the costs of such action or
 " suit which shall be so relinquished by him: and provided
 " also, that where any such creditor shall have *brought* any
 " action or *suit* against such bankrupt jointly with any other
 " person or persons, his relinquishing such action or suit
 " against such bankrupt or bankrupts, shall not in any
 " manner affect such action or suit against such other per-
 " son or persons."

It seems that proving a debt under a commission is an election within the foregoing section, which deprives the creditor of his remedy by action against the bankrupt^b, in the cases excepted in stat. 5 Geo. 2. c. 30. s. 9. But this clause does not extend to prevent a creditor who proves a joint debt under a commission against one partner from suing the others^c. The drawer of a bill of exchange, who has paid the

z See *Howell v. Gollidge*, 5 Taunt. 174. b *Heath v. Hall*, 4 Taunt. 326. See also *Young v. Glars*, 10 East, 252.
 a *Read v. Sowerby*, 3 M. & S. 78.

amount to the holder after a commission of bankruptcy issued against the acceptor, may sue the acceptor before he has obtained his certificate and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission^e.

An express promise (48) by a bankrupt after having obtained his certificate, to pay an antecedent debt, is binding^d; but if the promise be to pay when he is able, the plaintiff must prove ability at the time of action brought^e.

In the case of an express promise after certificate, the plaintiff is not obliged to declare specially^f, but may declare on the original cause of action; and if the bankruptcy be pleaded the plaintiff may give the subsequent promise in evidence.

If a bond for the payment of money has been forfeited before bankruptcy^g, quære, whether payment of interest by the bankrupt, after certificate, will render him liable to be sued on the bond?

By stat. 5 Geo. 2. c. 30. s. 9. "If any commission shall issue against any person who shall have been discharged by that act, or shall have compounded with his creditors, or delivered to them his estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors, the body only of such person conforming to the act, &c. shall be free from arrest and imprisonment; but the future estate and effects shall remain liable." The true construction of this clause is, that the compositions it contemplates are not such as are *limited*, but to such as are *general*, and would admit all creditors of whatever description they may be. Hence a deed of composition, framed only for the *joint* creditors of two bankrupts, under which seven of the joint creditors, whose debts exceeded 2000*l.* accepted of

^c Mead v. Braham, 3 M. & S. 91.

^d Trueman v. Fenton, Cowp. 544.

^e Buxford v. Snydery, 2 H. Bl. 116.
per 3 Jus.

^f Williams v. Dyde, Peake's N. P. C. 69 cites Russell v. Hardman, B. R. M. 33 G. 3 S. P.

^g Alsop v. Brown, Doug. 191.

(48) The promise must be precise and positive; for if it be given by the bankrupt in loose general terms, e. g. "that his effects will pay 20*s.* in the pound, and that he will pay every body," it will not be binding. Lynbury v. Weightman, 5 Esp. N. P. C. 198. Ellenborough, C. J.

the proffered composition of 3s. in the pound, but which was not signed or accepted by three other joint creditors, whose debts amounted to 92*l.*, nor by the separate creditors of one of the bankrupts^b, is not such a "compounding with his creditors" as will, within the foregoing clause, avoid the effect of a subsequent certificate under a commission of bankrupt, to protect the future estate and effects as well as the person of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods by one of his separate creditors.

Of Discharge by Certificate in foreign Country.—What is a discharge of a debt in the country where it is contracted, is a discharge of it every where (49).

Hence, if a bankrupt in Ireland, obtain his certificate there, and come into England, he will be discharged by such certificate from a debt contracted in Ireland, prior to the commission^c.

So where the defendant gave the plaintiff at Baltimore in America, where both were resident, a bill of exchange drawn by the defendant upon a person in England, which bill was afterwards protested here for non-acceptance^d, and the defendant afterwards, while he was resident abroad, became a bankrupt there, and obtained a certificate of discharge by the law of that state; it was holden, that such certificate was a bar to an action here upon an implied assumpsit to pay the bill in consequence of the non-acceptance in England; Lawrence, J. observing, that when the plaintiff agreed to take the bill in question, the promise in effect was this, to pay the money in America, if it were not paid here. When the bill having been refused acceptance here, the implied promise to pay the money arose in America, and consequently the defendant's certificate was a bar to the demand.

But a discharge under a commission of bankrupt in a foreign country, is not any bar to an action for a debt contracted here with a subject of this country^e.

Set-off.—By stat. 5 Geo. 2. c. 30. s. 28. "Where it shall

^b Norton v. Shakespeare, 15 East, 619.
Curling v. Oakley, C. B. London
Sittings after Trin. T. 54 Geo. 3.
coram Gibbs, C. J. S. P.

ⁱ Ballantine v. Golding, Co. B. L. 5th
edit. p. 499.

^k Potter v. Brown, 5 East's R. 124. *

^l Smith v. Buchanan, 1 East's R. 6.

(49) This principle was recognized in Hunter v. Potts, 4 T. R. 182.

“ appear to the commissioners, or the major part of them,
 “ that there hath been mutual credit given by the bankrupt
 “ and any other person, or mutual debts between the bank-
 “ rupt and any other person, at any time before such person
 “ became a bankrupt, the commissioners, or the major part
 “ of them, or the assignees of such bankrupt’s estate shall
 “ state the account between them, and one debt may be set
 “ against another, and what shall appear to be due on either
 “ side of the balance of such account, and on setting such
 “ debts against one another, and no more, shall be claimed or
 “ paid on either side respectively.”

A., a merchant, employed B., a broker, to effect policies and sell goods, and entrusted him with the policies; A. being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.’s hands for sale, but not on those goods to the exclusion of A.’s general credit, became bankrupt. Afterwards a loss happened, and B. received it from the underwriters: held^m that this was a mutual credit, within the foregoing statute, and that B. might retain the sum received for the loss, in liquidation of his advance as well as of the balance due for premiums.

Plea of Set-off.—It was formerly holden that a set-off could not be allowed as against the assignees of a bankruptⁿ; but in a modern case, where an action was brought by the assignees of a bankrupt; the court said, they were clearly of opinion that the defendant might set off a debt due to him from the bankrupt^o. The debt, however, intended to be set off must have accrued before the act of bankruptcy^p; for where defendant attempted to set off a note which had been indorsed to him after the bankruptcy, the court resisted the attempt.

So defendant cannot set off cash notes issued by the bankrupt^q, payable to J. S. or bearer, though the notes bear date before the bankruptcy, unless the defendant shews that such notes came to his hand before the bankruptcy (50).

To enable the holder of a bankrupt’s acceptances to avail

m *Olive v. Smith*, 5 Taunt. 56.

n *Ryall v. Larkin*, 1 Wils. 155.

o *Ridout v. Brough*, Cowp. 133.

p *Marsh v. Chambers*, Str. 1234.

q *Dickson v. Evans*, 6 T. R. 57.

(50) Lawrence, J. observed, in this case, that if the notes had been made payable to the defendant himself, he should have thought it reasonable evidence of their having come to his hands at the time they bore date.

himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bills so set off subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills.

The defendants had accepted bills for the accommodation of a trader. He, after committing an act of bankruptcy, but before a commission was sued out, lodged money with the defendants for the purpose of taking up the bills, which did not become due until after the commission was sued out, and were then paid by the defendants. It was holden^a, that the defendants were bound to refund this money to the assignees; and that they were not entitled to a set-off under the preceding statute: for the statute is expressly confined to mutual credit and mutual debts *at any time before such person became a bankrupt*. The money in question was not the bankrupt's money, but the money of his assignees: it was always a debt due to them, and consequently a debt due from the bankrupt could not be set off against it.

IX. *Of the Evidence, and Witnesses.*

FORMERLY in actions brought by the assignees of a bankrupt, it was incumbent on them to prove, in all cases:

1. That the bankrupt was a trader within the meaning of the statutes.
2. The act of bankruptcy.
3. That the commission was regularly granted.
4. The assignment to the plaintiffs.
5. A right of action in the assignees.

But now by stat. 49 G. 3. c. 121. s. 10. (passed 20th June, 1809) it is enacted, "that after the passing of this act, in any action now brought, or hereafter to be brought, by or against any assignee of any bankrupt, the commission of bankruptcy, and the proceedings of the commissioners under the same, shall be evidence to be received of the petition-

^a *Oughterley v. Easterby*, 4 Taunt. 808. ^b *Tamplin v. Digges*, 2 Camp. N. P. C. 312.

"ing creditor's debt (51) and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined, give notice (52) in writing to such assignee that he intends to dispute such matters or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial, and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs, and, if the other party shall obtain a verdict, shall be set off or deducted from the costs, which such other party would otherwise be entitled to receive from such assignee."

To render the proceedings evidence under the foregoing statute it is sufficient to shew that they are produced from the custody of the solicitor to the commission, or to prove the hand-writing of one of the commissioners before whom they were taken¹. The statute is not confined to cases where the assignees are named as such on the record². But if the title of assignees of a bankrupt's estate, strangers to the record, comes in question incidentally, it must be proved in the same

¹ Collinson v. Hillear, 3 Camp. N. P. u Simmonds v. Knight, 3 Camp. N. P. C. 30. C. 251.

(51) By virtue of this clause even the deposition of the petitioning creditor before the commissioners (being a part of the proceedings) becomes evidence of his debt in all cases where notice has not been given that it is intended to dispute the petitioning creditor's debt³.

(52) The notice is not to be considered as part of the defendant's evidence. It may be proved as soon as the commission is produced, and it will immediately put the opposite party upon supporting the commission in the same manner as before this statute was made. *Decharme v. Lane*, 2 Camp. N. P. C. 324. When defendant has been permitted to withdraw his plea and plead *de novo*, he may give the notice with the second plea; and that will be sufficient, although no notice was given with the first plea. S. C.

³ *Bisse v. Randall*, 2 Camp. N. P. C. 493. *Lawrence, J.*

mode as before this statute, although no notice of contesting the bankruptcy has been given by the opposite party^a. And it is to be observed that, under the statute the proceedings are only *prima facie* evidence, and that witnesses may be called by the defendant to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy^b. In proving the title of assignees of a bankrupt, if the petitioning creditor was the assignee of another bankrupt, it is necessary to prove the title of the petitioning creditor to be such assignee, by all the like proof by which the title of the assignee in question is to be proved^c.

Having in the three first sections of this chapter enumerated the different trades which render persons liable to the bankrupt laws, and also the several acts of bankruptcy mentioned in the statutes, it will be unnecessary to repeat them here; I shall proceed, therefore, to the examination of the third head, viz. the proof relating to the commission.

3. Proof of the commission ought to be by shewing it under seal^a, the petition to the chancellor on which it was granted, and the debt of the petitioning creditor or creditors. By stat. 5 Geo. 2. c. 30. s. 23. no commission shall issue upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners, amount to 100*l.* or upwards; of two creditors, to 150*l.* or upwards; of three or more creditors, to 200*l.* or upwards.

If the debt, as against the bankrupt^b, amount to the sum required; it is sufficient, though the creditor should have acquired it for less; as where the debt (amounting to 100*l.*) consisted of notes payable by the bankrupt to other persons, who, before the act of bankruptcy, had indorsed them to the petitioning creditor upon his paying 10*s.* in the pound for them; it was holden, that this debt was capable of supporting the commission.

If a creditor to the amount required before an act of bankruptcy^c, receives, after notice of the bankruptcy, a part of his debt so as to reduce it under 100*l.*, he is not precluded from suing out a commission, because the part payment of the debt was illegal and cannot be retained; consequently, the original debt remains in force to support the commission.

x *Doe v. Liston*, 4 Taunt. 741.

y *Ellis v. Shirley*, 3 Campb. 526. See also *Mills v. Bennett*, 5 B. & C. 526.

z *Doe v. Liston*, 4 Taunt. 741.

a Bull. N. P. 41.

b *Ex parte Lee*, 1 P. Wms. 793.

c *Mann v. Shepherd*, 6 T. R. 79.

So where the petitioning creditor's debt had been reduced below the amount required^d, by a bill drawn by the bankrupt on a person who, not having any effects of the bankrupt, refused to accept it, the original debt was considered as still in force, and sufficient to support the commission.

A commission sued out upon the affidavits of four petitioning creditors, whose debts do not appear upon the face of those affidavits to amount to 200*l.* is not void, the provision in the act respecting such affidavits being directory only, and not conditional^f.

In order to prove the petitioning creditor's debt^g, the assignees relied on an entry in the bankrupt's books^h, made some months before the act of bankruptcy, wherein it was stated that the bankrupt was indebted to the petitioning creditor in more than 200*l.*; but there was not any evidence that the debt continued down to the time of the bankruptcy; but *Ld. Ellenborough, C. J.* held that the debt being proved to have once existed, its continuance would be presumed.

Taking a security of a higher natureⁱ, after the bankruptcy, for a debt of an inferior nature, contracted before, does not so far extinguish the original debt as to prevent the creditor from suing a commission upon it; as in the case of a bond taken for a simple contract debt.

A. a trader^k, before he commits any act of bankruptcy, draws a promissory note for 200*l.*, payable to B. or order, then A. commits an act of bankruptcy, and afterwards B. indorses the note over to C., who is the petitioning creditor; it was holden *per totam curiam*, that he may well be so, for the 200*l.* was a debt due from the bankrupt before he committed the act of bankruptcy, to some person, viz. to B.

If two persons exchange acceptances, and before the bills are mature one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance^l.

In a case^m, where the petitioning creditor had a debt of 100*l.* due at the time of his petitioning upon two bills for 50*l.* each, drawn and issued before the act of bankruptcy, but which did not fall due till afterwards; the court were of

^d *Blickerdike v. Bollman*, 1 T. R. 405.

^e *Hill v. Heale*, 2 Bos & Pul. N. R. 196.

^f 5 G. 2 c. 30. s. 23.

^g *Jackson v. Irvin*, B. R. 2 Camp. N. P. C. 48.

^h See *Ever v. Preston*, C. T. H. 379.

ⁱ *Ambrose v. Clendon*, Str. 1042. and *Ca. T. Hard.* 267.

^k *Anon.* 2 Wils. 135.

^l *Sarratt v. Austin*, 4 Taunt. 200.

^m *Brett v. Levett*, 13 East, 213.

opinion, that this constituted a good petitioning creditor's debt; for the stat. 7 Geo. 1. c. 31. which admitted of the proof under commissions of bankrupt of debts arising on securities payable at a future day, provided that no creditor upon such securities should be deemed to be a sufficient creditor to petition for any commission, "until such time as such debt should become due and payable." Therefore the legislature must have intended, that when the debt did become due to the holder of such securities, he might be a petitioning creditor. It should be remarked, that in this case the bankrupt was indebted in more than 100% at the time of the act of bankruptcy, to different creditors, although no single creditor could then have made a good petitioning creditor.

Goods sold and delivered "upon an agreement to be paid for by a present bill payable at a future day, does not create a present debt on which a commission of bankrupt can be founded. Neither can such executory contract, if no such bill payable at a future day be actually given, constitute a good petitioning creditor's debt within the stat. 7 Geo. 1. c. 31. s. 1. and 5 Geo. 2. c. 30. s. 22. the legislature clearly intending to confine the power of petitioning for a commission of bankrupt to such creditors as have *written securities* payable at a future day. The stat. 46 Geo. 3. c. 135. s. 5. has not made any alteration in the law in this respect^u.

Upon a sale of goods at six or nine months credit, the purchaser by not paying at the end of six months, makes his election to take credit for the nine months, and there is not any debt to support a commission until the nine months are expired^v.

The debt of the petitioning creditor must be a legal debt; hence the assignee of a bond cannot be the petitioning creditor^w. But a simple contract debt, though of above six years standing, will be sufficient^x; for though the statute of limitations takes away the remedy, it does not destroy the debt. Husband entitled to a debt in right of his wife as executrix, cannot alone be the petitioning creditor, and the plaintiff assignee was nonsuited, because the wife was not made a petitioner with him^y.

^u *Hoskins v. Duperoy*, 9 East, 498. but see stat. 49 G. 3. c. 121. s. 9. post. p. 250.

^v *Moss v. Smith*, B. R. H. 49 G. 3. MS. p. Price v. Nixon, 5 Taunt. 338.

^w *Medlicot's case*, in Ch. Str. 899. per Lord Macclesfield, C. in ex parte Lat., 1 P. Wms. 793. S. P.

^x *Quantock v. England*, 5 Burr. 2628. adopting the opinion of Eyre, C. J. in *Swayn v. Wallinger*, Str. 740.

^y *Motes v. Winter*, at the London Sittings, before Lord Hardwicke, Davies 291, 293. and 2 Montagu, 129.

Husband alone cannot be the petitioning creditor in respect of a debt composed partly of a sum due to him in his own right and partly of a sum due to his wife *dum sola*².

Where the debt is due to a partnership, it must appear that all the partners to whom it is due concur in the proceeding. Hence a commission issued on the petition of one only of two partners to whom a joint debt is due, cannot be supported³.

A debt due to an attorney for his bill of costs, although a bill has not been signed and delivered by him in pursuance of stat. 2 G. 2. c. 23. s. 22. is notwithstanding a legal debt, and will support a commission⁴.

A debt for money lent due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt, and the affidavit made in order to obtain the commission may be an affidavit of debt for *money lent*⁵.

It is a general rule, that the debt must have been contracted before the act of bankruptcy.

In action for a breach of promise of marriage A. recovered damages above 100l. against a trader, who between verdict and judgment committed an act of bankruptcy; held that the debt on judgment was not a good petitioning creditor's debt⁶.

But by stat. 7 Geo. 1. c. 31. reciting that traders had been obliged to sell their goods upon credit, and to *take bills*, bonds, and promissory notes, or other personal securities for their monies payable at a future day, and that the buyers becoming bankrupts, before the money upon the securities became payable, it had been a question whether such persons giving credit on such securities should be let in to prove their debts, it is enacted and declared, "that all persons giving credit on such securities upon a good and valuable consideration *bonâ fide* for any sum of money, or any thing not due or payable at or before the bankruptcy, shall be admitted to prove their bills, bonds, notes, or other securities, *promise or agreement for the same*, in the same manner as if they were made payable presently, and

† Ramsey v. George, 1 M. & S. 176.

u Buckland v. Newsome, 1 Taunt. 477.

x Exp. Sutton, 11 Ven. jun. 164. 1d. Eldon. Ch.

y Bryant v. Withers, 9 M. & S. 123.

z Ex parte Charles, 14 East, 197.

"not at a future day." By a proviso, however, in this act, (s. 3.) such creditor was disabled from petitioning for a commission, until the debt became actually payable. But this disabling proviso is repealed by stat. 5 Geo. 2. c. 30. s. 22. and it is thereby enacted, "that a creditor having bills, bonds, notes, or other personal securities (omitting promise or agreement for the same) may petition for a commission." This last clause has been considered as a legislative construction of the 7 Geo. 1. confining the operation of that statute to written securities only^b.

A. drew a bill of exchange on B. (who accepted the same) payable two months after date to A.'s own order^c. Soon after the acceptance, but before the bill became due, A. the drawer, (having previously indorsed the bill) became a bankrupt. Payment having been refused, the holder brought an action against A. the drawer, who defended it on the ground of his bankruptcy, and, having obtained his certificate; it was objected on the part of the plaintiff, that there was a distinction between this case, where the bill having been accepted, the drawer only became contingently liable in default of the acceptor, which default was not made until after the bankruptcy, and consequently no debt due from the drawer before; and prior cases which had been decided, where the bill having been refused acceptance, the drawer became immediately liable. That the bankruptcy of the drawer having happened before the day of payment arrived, the bill could not be proved under his commission; for there was not then any *debitum in presenti solvendum in futuro*, but it was altogether contingent whether the bankrupt would ever be indebted or not. On the part of the defendant, the case of *Macarty v. Barrow* was relied on, where it was resolved, that a debt is created immediately upon drawing the bill. The court were of opinion, that the defendant was discharged by his certificate; Lord Ellenborough, C. J. observing, that the plain letter of the stat. 7 Geo. 1. c. 31. was decisive of the question; and that it was not necessary to resort to the opinion delivered in *Macarty v. Barrow*, the propriety of which his lordship seemed to doubt. Grose, J. declared his concurrence on the ground of the statute; but observed also, that he should hesitate long before he decided against the doctrine laid down in *Macarty v. Barrow*, which had been often recognized since, that the drawing of a bill of exchange constituted a *debitum in presenti* from the drawer, though *solvendum in futuro*.

^b *Hoskins v. Duperoy*, 9 East, 503.

^c *Stacey v. Barns*, 7 East, 435.

By stat. 49 G. 3. c. 121. (20th June, 1809) s. 9. it is enacted, "that all persons who have given credit, or shall at any time hereafter give credit, to any person or persons who is, or are, or shall become bankrupts, upon good and valuable consideration *bonâ fide* for any money, which is or shall not be due or payable at or before the time of such person's becoming bankrupt, shall be admitted to prove such their debts in like manner as if the same were payable presently or not at a future day, and shall be entitled to, and shall have and receive proportional dividends of such bankrupt's estate equally with the other creditors of such bankrupt, deducting only thereout a rebate of interest for what they shall so receive at the rate of five pounds per centum per annum, under commissions which have issued, or shall issue, in England, and at the rate of six pounds per centum per annum under commissions which have issued, or shall issue, in Ireland, to be computed from the actual payment thereof to the time such debts would become payable, according to the terms upon which the same were contracted."

It is also an established rule, that the assignees must prove the debt of the petitioning creditor, by the same evidence which must have been produced in an action against the bankrupt.

Hence, in order to prove a petitioning creditor's debt, which arises by bond, proof of the acknowledgment of the obligor will not supersede the necessity of calling the subscribing witness^d.

Entries made by the bankrupt in his books *before* the act of bankruptcy, provided the import of them is clear and unequivocal, are to be considered in the same light as parol declarations of the bankrupt, and therefore sufficient proof of the petitioning creditor's debt.

The commission must appear to have been regularly granted.

Where there are three partners, and two only commit acts of bankruptcy, there may be separate commissions against the two, but there cannot be a joint^e commission against them

d *Abbot v Plumber*, Doug 215.
e *Watts v Thorpe*, 1 Camp N P C.
370 S. P admitted in *Ranken v.*
Hoerner, Somerset Lent Assizes,
1813.

f *Allen v. Downs*, B. R. M. 25 G. 3
cited in a note to *Scott v. Surman*,
Willes, 474.

(53). So where one of three partners is an infant^k, lunatic, or residing abroad^l, there may be separate commissions against the other two, if they commit acts of bankruptcy.

A second commission sued out against a bankrupt, pending a former, under which he has not obtained his certificate, is void^l, for an uncertificated bankrupt is incapable of trading for his own benefit.

A commission founded upon an act of bankruptcy, by lying two months in prison, cannot be sued out before the expiration of the two months. The act is not completed before that time, and the affidavit to obtain it would be perjury^k.

A debtor of the bankrupt resisting a claim made by the assignees under the commission against him may give in evidence, in order to defeat such commission, a prior act of bankruptcy, and a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy. But neither the bankrupt^l, or any person claiming under him, will be permitted to avail himself of this defence^m. Nor will proof of a prior act of bankruptcy avail, unless the petitioning creditor's debt be shewn to exist prior to the act of bankruptcyⁿ; it is not, however, required to be shewn, that the creditor ever meant to take out a commission upon that debt.

The circumstance of a creditor having proved a debt under a commission will not estop him from impeaching the commission in an action brought by the assignees against him.

g Ex parte Henderson, 4 Vesey, jun. 163.

h Exp. Layton, 6 Ves. jun. 434.

i Martin v. O'Hara, Cowp. 823.

k Gordon v. Wilkinson, 8 T. R. 507.

l Parker v. Manning, cited in Doe v.

Boulton, 2 Esp. N. P. C. 597. Mercer v. Wise, 3 Esp. N. P. C. 210.

m Donovan v. Duff, 9 East, 21.

n Per Lord Eldon, C. in R. v. Ballock,

1 Taunton's R. 89. See also Miles v. Rawlin, 4 Esp. N. P. C. 191.

(53) If three be bound jointly and severally in a bond, the obligee ought to sue them all jointly, or each of them separately, for if he sue two only of the three, advantage may be taken of the omission by a plea in abatement, that another jointly sealed the bond, and that he is still living. Per Keble, to which Brian, C. J. agreed, 10 H. 7. 16 a. b. Bro. Obl. 94. This matter, however, cannot be given in evidence on *non est factum*. nor can advantage be taken of it, in any other way than by a plea in abatement. See Serjt. Williams's note on Cubell v. Vaughan, 1 Saund. 291. b. n. (4).

self^o; nor is it *prima facie* evidence^p of the validity of the commission.

The debt of a creditor, who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission, by a defendant in an action at the suit of the assignees under that commission. *Beardmore v. Shaw*, 1 Bos. & Pul. N. R. 263.

4. The assignment is to be proved by the production of the deed^q; and proof of the execution of it by the commissioners.

5. The cause of action must be proved by the assignees in the same manner, as if the action had been brought by the bankrupt himself. It is impossible to lay down any rules with respect to this head of proof, which must necessarily be adapted to the nature of the demand.

In trover by assignees against a sheriff or creditor, who has seized the bankrupt's goods in execution, after an act of bankruptcy, it is not necessary to prove a demand and refusal^r; because the property being vested in the assignees from the time of the bankruptcy, the execution is tortious; and where a possession is gained wrongfully, a demand is not necessary.

Of the Witnesses.—The bankrupt cannot be a witness to swear property in himself^s, or a debt due to himself unless he has obtained his certificate, and executed a release to the assignees of his share in the surplus and the dividends; for otherwise it is manifest that he is interested; but he may prove property in, or a debt due to, another. It may be observed, however, that a release and certificate cannot make the bankrupt a witness to prove his own act of bankruptcy^t (54).

No question can be asked from the bankrupt, the object

^o *Stewart v. Richman*, 1 Esp. N. P. C. 108. ^r *Rush v. Baker*, M. & G. 2. B. R. MSS. Bull. N. P. 41.

^p *Rankin v. Horner*, 16 East, 191. ^s *Ewens v. Gold*, per Hardwicke, C. J. H. & G. 2. Bull. N. P. 43.

^q Bull. N. P. 41.

^t *Field v. Curtis*, Str. 829.

(54) "For although the bankrupt has obtained a certificate, yet if he be not a bankrupt (as he cannot be if he has not committed an act of bankruptcy, which is the question) his certificate and all the proceedings under the commission, are void."

of which is to support his own bankruptcy; and it is immaterial whether such question be asked upon an examination in chief, or upon a cross examination^a. It is equally improper in both cases. Nor can a bankrupt (55) be asked questions, the effect and tendency of which is to establish an antecedent act of bankruptcy^a.

Nor to explain an equivocal act of bankruptcy⁷.

Nor, if a joint commission issues against two, can one, having obtained his certificate, be called to prove an act of bankruptcy committed by the other^a.

But although the bankrupt cannot be a witness to prove his own act of bankruptcy, yet what was said by him, *at the time*, in explanation of his own act, may be received in evidence^a. Hence, if he has been absent from home, a declaration by him on his return home, that he had been abroad in order to avoid creditors, is good evidence.

In an action by the obligees of a joint and several bond against one of the obligors, who was surety for another of them who had become bankrupt, which action was brought

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| <p>^u <i>Elsom v. Brailey</i>, C. B. London Sit-
tings after M. T. 50 G. 3. Lawrence,
J. S. P.</p> <p>^x <i>Wyatt v. Wilkinson</i>, C. B. London
Sittings, Chabre, J. 5 Esp. N. P.
C. 187.</p> | <p>^y <i>Hoffman v. Pitt</i>, 5 Esp. N. P. C. 22.
Ellenborough, C. J.</p> <p>^z <i>Flower v. Herbert</i>, cited 2 H. Bl.
279.</p> <p>^a <i>Bateman v. Bailey</i>, 5 T. R. 512.
<i>Ewens v. Gold</i>, per Hardwicke, C. J.
Bull. N. P. 40. S. P.</p> |
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(55) In an action by the assignees of a bankrupt for money had and received, in order to establish the act of bankruptcy, the plaintiffs proved that the trader had absconded for fear of being arrested. The defendant in order to substantiate his defence in proof called the bankrupt. The plaintiffs offered to cross examine him, as to the time of his first secreting himself for fear of being arrested. Norton and Ford for defendant objected, that he could not be examined to that fact; for he was not a competent witness, being interested to establish his bankruptcy; and it was settled that the plaintiffs could not produce him to prove an act of bankruptcy, though he might be examined as to collateral matter. On the part of the plaintiffs it was admitted, that he could not be produced by the plaintiff as a witness in chief to that fact, but when the defendant called him, and made him a competent witness in the cause, he submitted to his being examined and could not prevent any question being asked his own witness. Lee, C. J. "I think the defendant, by calling the witness, has waived all objections to his competency; and therefore he may be examined as to the time of the bankruptcy." *Fletcher and Bolton, assignees of Gill, bankrupt, v. Woodmass*, B. R. London Sittings, M. 25 G. 2. M.S.

after the plaintiffs had elected to prove their debt under the commission, and thereby had relinquished their action against the bankrupt by s. 14. stat. 49 G. 3. c. 121.; *the bankrupt* not having obtained his certificate, and therefore still liable to be sued by the defendant, his surety, in case of a verdict against him by the plaintiffs, is not a competent witness for the defendant, to prove that a payment of a sum equal to the penalty of the bond made by him (the bankrupt) to the plaintiffs, before action brought was made in discharge of the bond, and not upon another account^b.

A certificated bankrupt cannot be a witness to prove any of the facts necessary to support the commission^c, as the petitioning creditor's debt^c, &c. because he is interested in upholding the commission, on the validity of which his certificate and discharge from his former debts depend (56). But to prove other matters he may^d, that is, when he has executed a release to his assignees of his share in the surplus and dividends. See ante.

A certificated bankrupt, under a second commission of bankruptcy, cannot be a witness for the assignees under that commission^e, if he has not paid 15s. in the pound under it.

An uncertificated bankrupt may be a witness *against* himself, but not *for* himself, that is, he may be a witness to decrease the fund, but not to increase it^f.

Upon an issue out of chancery to try, whether the bankrupt had, within one year before his bankruptcy, lost five pounds in one day at gaming, a creditor of the bankrupt was called to prove the gaming; but the C. J. would not allow him to be a witness; because he would be entitled to a share out of the bankrupt's allowance forfeited by the gaming^g.

Upon an issue to try the validity of a commission of bankrupt, a creditor is not a competent witness to support the

^b *Townend v. Downing*, 14 East, 565.

^c Per Cur. in *Chapman v. Gardner*, 2 H. Bl. 279.

^d Per Ryder, C. J. in *Flower v. Herbert*, London Sittings, Dec. 17, 1754. 2 H. Bl. 279 n. (a.)

^e *Kennet v. Greenwollers*, *Peake's N. P. C. 3.* per Kenyon, C. J.

^f *Butler v. Cooke*, Cowp. 70. and *Walker v. Walker*, there cited.

^g *Shuttleworth v. Bravo*, Str. 507. per Pratt, C. J. *Middlesex Sittings*.

(56) The certificate may be considered also as a release, which the release can never be allowed as a witness to affirm. Per Ryder, C. J. in *Flower v. Herbert*, N. P. 2 H. Bl. 279. n. (a.).

commission, although he does not appear to have proved under it^b.

A creditor who has released his debt to the assignees may be called to prove the act of bankruptcy, although the bankrupt is plaintiff in the action in which the commission is disputed^c.

A release to the assignees only is sufficient without giving one to the bankrupt^d.

A creditor who has sold his debt is a good witness to support the commission, by proving the petitioning creditor's debt; because his interest is gone^e; but the petitioning creditor is not a competent witness, to shew that the commission was regularly sued; for he enters into a bond to the chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. He has therefore a direct interest in the question at issue^f. But he is competent to prove the commission invalid^g.

A writ of supersedeas under the great seal, reciting the issuing of a commission on such a day, is *prima facie* evidence not only of the issuing of the commission but also that it issued on that day^h.

^b Adams v. Malkin, 3 Campb. 543

^c Koopes v. Chapman, Feake's N. P. C. 19, per Kenyon, C. J.

^k Ambrose v. Clendon, Ca. Temp. Hardw. 267.

^l Granger v. Furlong, 2 Bl. Rep. 1273

^m Green v. Jones, 2 Camp. N. P. C. 411.

ⁿ Anon. cited by Lord Ellenborough, C. J. in Green v. Jones

^o Gervis v. Grand Western Canal Company, B. R. E. 50 Geo. 3. 5 M & S

C H A. P. VIII.

BARON AND FEME.

I. *Of the Liability of the Husband,*

1. *In respect of Contracts made by the Wife before Coverture.*
2. *In respect of Contracts made by the Wife during Coverture.*
3. *In respect of the Children of the Wife by a former Husband.*

II. *In what Cases a Feme Covert may be considered as a Feme Sole.*

III. *Of Actions by Husband and Wife,*

1. *Where the Husband and Wife must join.*
2. *Where the Husband must sue alone.*
3. *Where the Husband and Wife may join, or the Husband may sue alone, at his Election.*

IV. *Of Actions against Husband and Wife.*

1. *Of the Liability of the Husband,*

1. *In respect of Contracts made by the Wife before Coverture.*
2. *In respect of Contracts made by the Wife during Coverture.*
3. *In respect of the Children of the Wife by a former Husband.*

1. *In respect of contracts made by the Wife before Coverture.*—The husband is liable to the debts of his wife,

contracted by her before the coverture, and the husband and wife may be sued for such debts during the coverture^a (1). But if these debts are not recovered against the husband and wife, in the life-time of the wife, the husband cannot be charged for them either at law^b or in equity after the death of the wife (2).

The defendant's wife^c, before marriage, gave a promissory note for 50*l.* to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 700*l.*, part whereof consisted of choses in action. The plaintiff did not during the coverture recover judgment upon the note against the husband and wife. The wife died about a year after the marriage. The defendant on her death took out letters of administration. Some of the choses in action had been received by the defendant as husband in the life-time of the wife, the rest he took as her administrator. The plaintiff finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to answer his the plaintiff's demand, for so much as he had received out of the clear personal estate of the wife upon his marriage.

Lord Talbot, Ch. said, that as on the one hand the husband was by law liable, during the coverture, to all debts contracted by his wife, *dum sola*, whatever their amount might be^d, although she did not bring him a portion of one shilling; so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. He added, that the wife's choses in action were assets, and thereupon decreed an account of what the husband had received since his wife's death as her administrator, and that he should be liable for so much only; but as to any further demand against him, dismissed the bill.

2. *In respect of Contracts made by the Wife during Cover-*

^a F. N. B. 120. F.

^b F. N. B. 121. C. 1. Rol. Abr. 331.

(G.) pl. 2.

^c Heard v. Stamford, 3 P. Wms. 409.

Ca. Temp. Talb. 173. S. C.

^d F. N. B. 120. F.

(1) In actions for the recovery of such debts, husband and wife must be joined. 7 T. R. 348.

(2) But if the wife survive the husband, an action may be maintained against her for the recovery of these debts. Woodman v. Chapman, 1 Camp. N. P. C. 189. Ld. Ellenborough, C. J.

ture.—All the personal estate of which the wife is possessed, in her own right, is by the marriage vested absolutely in the husband^e. Notwithstanding the law thus divests the wife of all her personal property, she cannot bind her husband by any contracts, even for necessities suitable to her degree and estate, without the assent of her husband, either express or implied (3).

During cohabitation, the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate, and the misconduct, or even the adultery of the wife, during that period, will not destroy this presumption. The same law is, where the husband deserts his wife, or turns her away, without any reasonable ground (4), or compels her by ill usage or severity^f to leave him; in all which cases, he gives the wife a general credit. This principle which tends to procure credit to the wife for necessities suitable to the degree and estate of her husband, is anxiously adopted by the law on every possible occasion; and although, in conformity with the ancient rule respecting dower, it has been decided, that where the wife elopes with an adulterer, the husband's assent to her contracts, during the term of the elopement, cannot be implied, yet, by analogy to the same rule^g, as soon as he receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation.

But it should be observed, 1st. as cohabitation is evidence only of the husband's assent^h, in a special verdict, that assent

^e 1 Inst. 351 b.

^f Per Lord Kenyon, C. J. in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

^g Per Lord Kenyon, C. J. 4 Esp. N. P. C. 42.

^h *Manby v. Scott*, 1 Bac. Abr. 296.

(3) "A feme covert generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied." Mr. J. Hyde's argument in *Manby v. Scott*, 1 Mod. 125.

(4) "If the husband turns his wife out of doors, though he advertises her, and cautions all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses." Per Lord Kenyon, C. J. in *Harris v. Morris*, 4 Esp. N. P. C. 42. See also *Boulton v. Prentice*, post. p. 263. where the court said the husband appears to be a wrong doer, and therefore has not a right to prohibit any person.

ought to be found; and 2ndly, as cohabitation is *presumptive* evidence only of such assent, it may be rebutted by contrary evidence. In like manner^l, evidence that the articles purchased were consumed in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent.

Having thus laid down the general positions respecting contracts made by the wife, I shall proceed to establish them by authorities, premising, that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant. Indeed, in contemplation of law, the wife is the servant of the husband. In F. N. B. 120 G. it is thus laid down: A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; *and so for the contract of the wife, if he give such authority to his wife, otherwise not.* From this passage it appears, that the husband is not liable to his wife's contracts, unless he has given his authority or assent; it is incumbent, therefore, on a creditor, who brings an action against a husband upon a contract made by his wife, to shew that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such assent has been given^k; and in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise; for the wife has not any power originally to charge the husband^l, but is absolutely under his power and government, and must be content with what the husband provides, and if he does not provide necessaries for her, her only remedy is in the spiritual court.

In an action on the case for goods sold and delivered^m, the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, that she was not in any want of clothes when she purchased these, and that the defendant, the last time that he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. Holt, C. J. said, that during cohabitation the husband shall answer all contracts of the wife for necessaries, for his assent shall be presumed to all such con-

^l 1 Sidf. 121, 126. S. C.

^k 1 Sidf. 127.

^l Per Holt, C. J. in *Etherington v.*

Parrot, Id. Raym. 1006.

^m *Etherington v. Parrott*, Salk. 118.

and Raym. 1006. This case was agreed per cur. to be good law in *Boulton v. Prentice*, M. T. 18 G. 2. Ford's MSS.

tracts upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by the warning in this case, there is not any room for such presumption: and he held, that the notice to the servant usually employed by the plaintiff in his trade was sufficient notice to the master.

If the wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts:

In an action for meat, &c. provided for defendant's wife^a, the defendant proved, that she went away from him with an adulterer; Raymond, C. J. held that the husband should not be charged, though the plaintiff had not any notice; and, he said, Holt, C. J. always ruled it so.

And, although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at a time when there was not any imputation on her conduct, yet if she afterwards commit adultery, the husband is not bound to receive or support her after that time, nor is he liable for necessaries, which may have been provided for her after that time^b. So where the husband turns his wife out of doors, on account of her having committed adultery under his roof^c, he is not liable for necessaries furnished to her after the expulsion.

So if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound^d.

If the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessaries during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of the separation at the time of the contract; if it were the general reputation of the place where the husband lived, that he and his wife were living apart:

The plaintiff brought an action against the defendant^e, a clergyman, who resided in the country, for medicines provided for the wife of the defendant, during her residence in London. It appeared, that the defendant and his wife, having disagreed, had separated by consent for five years, and

^a Morris v. Martin, Str. 617. See also
Malabarling v. Sands, Str. 706. S. P.
^b Olivier v. Hancock, 6 T. R. 602.
^c Ham v. Toovey, Middx. Sittings,
June 24, 47 G. 3. C. B. Sp. J. Sir
James Mansfield, C. J. MSS.

^d Child v. Hardyman, Str. 675. per
Lord Raymond, C. J.
^e Todd v. Stokes, Lord Raymond, 444.
and Salk. 416.

that upon the separation, the defendant had signed an agreement with certain trustees, by which he obliged himself to allow his wife twenty pounds a-year, which he had done accordingly. The plaintiff did not know at the time when he furnished the wife with the medicines, that she was a married woman. It was ruled by Holt, C. J. that the defendant was not liable; for, though the plaintiff had not any personal notice of the separation, and though it was not the general reputation in London, where the plaintiff lived, that the defendant and his wife were separated, yet, since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to prevent the wife from charging the husband, even for necessaries. Plaintiff nonsuited (5).

Assumpsit for the board and lodging of the defendant's wife: plea, *non assumpsit*. Lord Mansfield, in his charge to the jury, laid it down as clear and decided law, that when husband and wife live together, the husband is answerable for all such necessaries wherewith the wife may have been furnished; but that what are or are not necessaries, must depend on the rank and situation of the husband. That where they live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery; or if, upon separation, the husband agrees to make her a sufficient allowance, and pays it: in either of those cases, the husband is not liable; because, in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband. And as in all cases the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for, in such cases, he must trust her at

• Ozaud v. Darnford, B. R. Middx. Sittings, after M. T. 20 G. 3. M&S.

(5) "If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to Holt, C. J. shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessaries, it is incumbent on the husband to shew that the tradesman had notice of the separate maintenance." Per Ld. Eldon, C. J. in *Rawlins v. Vandyke*, 3 Esp. N. P. C. 250.

his peril. In the present case the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it; the jury, therefore, under his lordship's directions found a verdict for the plaintiff. N. In a similar case of *Turner and Winter*, his lordship nonsuited the plaintiff, because on separation the defendant had agreed to make an allowance to his wife, and had regularly paid it; notwithstanding the plaintiff had no notice of the transaction.

But a mere agreement for a separate allowance, without payment is not sufficient to exempt the husband from this liability:

Husband and wife having agreed to separate, a deed of separation was executed, (between the husband on the first part, his wife on the second part, and a trustee, the sister of the wife, on the third part) wherein the husband covenanted with the trustee, to pay the wife, during the separation, a weekly allowance; which she agreed to accept, in full satisfaction of her maintenance, provided that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance, until he should be reimbursed: the wife, upon the separation, went to live with the trustee, who supplied her with necessaries; the husband having failed to pay the weekly allowance, the trustee brought an action of *indebitatus assumpsit* against him for the amount of the necessaries: it was holden by Chambre, Rooke, and Heath, Js. that, although the trustee had another remedy, and might have brought an action on the deed, yet *assumpsit* was maintainable, on the ground that there was a common law obligation on the husband to provide necessaries for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, *without payment*, was not sufficient to exempt the husband from this liability. Sir J. Mansfield, C. J. expressed an elaborate opinion to the contrary, observing, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in *assumpsit* or debt for necessaries furnished to his wife.

But if the separate allowance be paid, it is sufficient, al-

though the separation be not by deed or writing*. The husband, however, cannot avail himself of the wife's receipts as evidence of the payment of the allowance*.

Where a husband by bringing another woman under his roof renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries: e. g. medicines in sickness⁷, during the separation.

If the husband causelessly turns² away his wife, or if the wife, having been absent from home, returns, and he shuts his doors against her⁴; and afterwards she contracts debts for necessaries, the husband will be liable; for he sends with her credit for her reasonable expenses. But if the husband turns away his wife on account of her having committed adultery, then he will not be liable⁵.

The following note of *Boulton v. Prentice*, which was obligingly extracted by the late Mr. Ford from his father's MS. at the request of the compiler, may be acceptable to the reader.

Assumpsit for goods sold and delivered to defendant's wife*. Verdict for plaintiff. On motion for a new trial, it appeared that defendant and his wife had formerly lodged at plaintiff's house, during which time the defendant had given plaintiff express notice not to trust defendant's wife. Afterwards defendant and his wife went to lodge at another place, where defendant used his wife ill, after which they separated, and defendant refused to receive her again (6); she desired him to

u *Hodgkinson v. Fletcher*, 4 Camp. 70. per Ld. Ellenborough, C. J.

x S. C.

y *Aldis v. Chapman*, Middx. Sittings, after Trin. T. 50 G. 3. Lord Ellenborough, C. J.

z *Lungworthy v. Hockmore*, per Holt, C. J. Lord Raym. 444. and per Holt,

C. J. in *Etherington v. Parrot*, Salk. 118.

a *Thompson v. Hervey*, 4 Burr. 2177.

b *Hain v. Tonvey*, ante, p. 260.

c *Boulton v. Prentice*, from Mr. Ford's MS. Note S. C. shortly reported in Str. 1214.

(6) "My conception of the law is this, that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expenses." Per Lord Eldon, C. J. in *Rawlins v. Vandyke*, 3 Esp. N. P. C. 251.—"Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill treatment, I shall rule it to be equivalent to a turning her out of the house, and that the husband shall be liable for necessaries furnished to her under those circumstances." Per Lord Kenyon, C. J. in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

maintain her and offered to return and cohabit with him, which he refused, and struck her; and declared that if any person trusted her, or gave her credit, he would not pay them; she had not any clothes and was wholly destitute of necessaries. The goods furnished to her by plaintiff were necessaries and suitable to the condition of the wife. On the part of the defendant it was proved, that defendant's wife used to pawn her clothes, and was addicted to drinking, that plaintiff had assisted her in pawning her watch, and that defendant a year before they parted had expressly forbidden plaintiff from trusting defendant's wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is in law grounded on the supposed assent of the husband, which assent cannot be supposed where, as in this case, there is an express prohibition. But it was answered, and so resolved by the court, that, although the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away and refused to maintain her; for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband in a case of this kind could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for her contracts; it is the cohabitation which is considered as the evidence of the husband's assent to the contracts made by his wife for necessaries; but if the husband during the cohabitation declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption, and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries which have been provided for her.

Another leading case on this subject is the case of *Manby v. Scott*⁴; there the wife of the defendant went away from him without his consent. During the separation, the hus-

band, who did not allow the wife any maintenance, expressly forbid the plaintiff to deliver any goods to his wife; notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action against the husband for the value of the goods. At the trial, the jury found that the goods were suitable to the degree of the husband. After three arguments in the Court of King's Bench, the judges were divided, whereupon the case was adjourned into the Exchequer, where nine of the judges (among whom was Hale, Chief Baron) (7) were of opinion, that the husband was not chargeable.

It is a question of fact, whether a tradesman who furnishes goods to a wife gives credit to her or her husband: if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods*.

The defendant treated his wife with great cruelty, and took another woman into the house with whom he cohabited; he confined his wife in her chamber under pretence of insanity; she escaped; and the plaintiff brought an action against the defendant for value of necessaries furnished to the wife after her departure; Lawrence, J. thought that as the wife might have had necessaries if she had remained, the action could not be supported. And Mansfield, C. J. thought that nothing short of actual terror and violence would support the action†.

If a man cohabits with a woman‡, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessaries, he will become liable, although the

c Bentley v Griffin, 3 Taunt. 356.
f Horwood v. Hefler, 3 Taunt. 421.

g Watson v. Threlkeld, 2 Esp. N. P.
C 637. Kenyon, C. J.

(7) See Hale's argument, Bac. Abr. Baron and Feme. H. Twisden, J. having delivered an opinion in the King's Bench in favour of the plaintiff, changed it afterwards, and agreed in opinion with

creditor be acquainted with her real situation; for here, a like assent will be implied, as in the case of husband and wife.

In an action for the use and occupation of apartments by the deft.'s wife^h, it appeared, that the apartments had been occupied by a lady, who went by the deft.'s name, and who had actually been married to him. The defence attempted to be set up was, that the deft. had a former wife then and still living. But Lord Ellenborough, C. J. said, that there was not any evidence to fix the plt. with a knowledge of the celebration of the first marriage, and that the deft. was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plt. every appearance of being his wife. By his misconduct in marrying a second wife, while his first was still alive, he had done what he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility.

3. *In respect of Children of the Wife by a former Husband.*

—If a man marries a woman having children by a former husband, he is not bound by the act of marriage to maintain such childrenⁱ; but if he holds them out to the world as part of his family, he will be considered as standing in *loco parentis*, and liable even on a contract made by his wife during his absence abroad, for the maintenance and education of such children^k (8).

See *Rawlyns v. Vandyke*, 3 Esp. N. P. C. 252. Lord Eldon's opinion as to how far a father is liable for necessaries furnished to his children, living with the mother apart from the father (9).

^h *Robinson v. Nation*, 1 Camp. N. P. k *Stone v. Carr*, 3 Esp. N. P. C. 1. C. 245. Kenyon, C. J.

ⁱ *Tubb v. Harrison*, 4 T. R. 118. recognized in *Cooper v. Martin*, 4 East, 76.

(8) Maintenance by the second husband of the children of wife by former husband, is a good consideration for a promise by such children, when they come of age, to repay the expense of their maintenance. *Cooper v. Martin*, 4 East's R. 76.

(9) The father of a bastard child is liable for its nursing and board, if he adopts it as his own, although an order of filiation has not been made on him. *Heskett v. Gowing*, 5 Esp. N. P. C. 131.

II. In what Cases a Feme Covert may be considered as a Feme Sole.

It will be proper to remark in the first place, that it is now clearly established, notwithstanding former decisions¹ to the contrary, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed.

This point was solemnly determined (after two arguments before the judges in the Exchequer Chamber) in *Marshall v. Rutton*, 8 T. R. 345.

It is, however, observable, that the policy of the law which has considered a married woman as incapable of suing, or being sued, without her husband, admits of some modification from particular circumstances:

1. By the custom of the city of London, (10) a feme covert being a sole trader, may sue or be sued in the city courts as a feme sole, with reference to her transactions in London, but even there the husband must be made a party to the suit for conformity.

A feme covert, sole trader in the city of London, cannot

¹ *Riugstead v. Lady Lanesborough*, *Cooke, B. L.* *Barwell v. Brooks and Corbett v. Puelnitz*, 1 T. R. 5.

(10) By the custom of London, "A feme sole merchant is, where the feme trades by herself in one trade in which her husband does not intermeddle, and buys and sells in that trade; then the feme shall be sued, and the husband named only for conformity, and if judgment be given against them, execution shall be against the feme only." *Langham v. Bewett*, Cro. Car. 68. "This custom is one of those customs called executory customs, the meaning of which expression is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." Per Lord Eldon, C. J. delivering the judgment of the court in *Beard v. Webb*, in error, Exchequer Chamber, 2 Bos. and Pul. 98. The judgment here referred to is very elaborate, and contains much useful information on this subject.

sue^m, or be sued^a, in the courts at Westminster without her husband.

2. A wife may acquire a separate character by the civil death of her husband, by exile^o, and formerly by profession and abjuration of the realm (11).

3. Where the husband had been transported for a term of years, before the expiration of which the debt was contracted, and sued for; Yates, J. thought that the transportation suspended the disability of the wife, and that she might be sued as a feme sole^p.

The following observations, which were made by Lord Eldon^q, on the preceding case, are worthy of great consideration. His lordship having said, that in the cases of abjuration, profession, &c, which amounted to a civil death, he thought he understood the situation in which the wife was placed, for the fiction of law, which considered the husband as civilly dead, put the wife in the same situation as if he were actually dead; then proceeded to observe that, "transportation for a term of years might give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal; but, besides the difficulties which might arise during the term of transportation, another difficulty of equal importance occurred, where the wife had contracted debts after the period of her husband's transpor-

m Cawdell v. Shaw, 4 T. R. 361.

n Beard v. Webb, 2 Bos. & Pul. 93.

o Belknap's case, 2 H. 4 7 a. it appears by the year book, 1 H. 4. 1 a. that Belknap was banished to Gascony, there to remain until he attained the King's favour, which Sir E. Coke considered as a banishment for ever.

p Sparrow v. Carruthers, cited in Lean v. Shutz, 2 Bl. R. 1197. and in Corbett v. Poelnitz, 1 T. R. 7.

q Marsh v. Hutchinson, 2 Bos. & Pul. 231.

(11) See 1 Inst. 133 a. where Sir Edward Coke says, "that an abjuration, that is, a deportation for ever into a foreign land like to profession, is a civil death; and *that is the reason* that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is *banished for ever*, as Belknap, &c. was; *this is a civil death*, and the wife may sue as a feme sole. But if the husband, by act of parliament, have judgment to be exiled *for a time*, which some call a relegation, that is not a civil death. Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted in law *civilliter mortuus*." 1 Inst. 130. a.

tation had elapsed, but before his actual return to his country. In the case of *Sparrow v. Carruthers*, Mr. Justice Yates seemed to have treated it as a material circumstance in evidence, that the time of transportation was not expired, and he did not give any opinion as to what would have been the situation of the parties, if it had been expired. The court could not presume to say how Mr. Justice Yates would have decided, had the husband continued to reside abroad, after the period of his transportation had expired, or had only remained there to arrange his affairs, with a view of returning to his country when he had so done."

Since the preceeding observations were made, the following case was decided at *Nisi Prius* in 1801:

In *assumpsit for goods sold and delivered**, the defence was; that the plaintiff was a married woman. The plaintiff's counsel answered this case by producing the record of the husband's conviction for felony in March, 1794, and of a sentence of transportation for seven years; whereupon it was insisted, on the part of the defendant, that the sentence being for seven years, from March, 1794, that time was now expired, so that the husband was competent to sue. But Lord Alvanley, C. J. said, that by the record of the conviction and sentence, there was conclusive evidence to support the right of action in the plaintiff as a feme sole, and though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that, if the defendant meant to rely on the circumstance of the husband having returned, the proof of that lay on the defendant. Evidence to this effect not being offered, the plaintiff had a verdict.

4. Where the husband is an alien, who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion.

In *assumpsit for goods sold and delivered**, the defendant pleaded that she was covert of the Duke de Pienne. It appeared in evidence, that the duke, who was an alien, had gone abroad in the year 1793, with an intention to return in four months, but had not returned; during his absence the defendant had kept house, and paid bills on her own account and in her own name.

Lord Kenyon, C. J. said, this case came within the prin-

* *Carrol v. Blencow*, June 8, 1801, 5 *Walford v. Duches De Pienne*,
Sittings after East. T. C. B. coram. June 7, 1797, *Middlesex Sittings*, 2
Alvanley, C. J. & Esp. N. P. C. 97. Esp. N. P. C. 554.

ciple of the common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the defendant not liable; *but here was a desertion of the kingdom*, and an absence for some years; he was no longer domiciled here, and; *in the interval*, the wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might starve. See also *Francks v. Duchess de Pienne*, 2 Esp. N. P. C. 587. to the same effect. But see *Kay v. D. de Pienne*, 3 Camp. N. P. C. 123. where Lord Ellenborough confines the preceding doctrine to the case, where the husband has never been in this kingdom.

In *De Gaillon v. Victoire Harel L'Aigle*, 1 Bos. & Pul. 357. where the replication to a plea of coverture was, that the husband resided abroad, (not stating him to be an alien), and that the defendant lived separate from him in this kingdom, that she traded as a feme sole, and plaintiff did not give credit to the husband, but traded with the defendant as a feme sole, and on her credit; the court held the wife chargeable as a feme sole. But it is conceived, that since the case of *Marsh v. Hutchinson*, 2 Bos. & Pul. 226, such a replication could not be supported, unless it appeared that the husband was an alien (12).

The case of *Marsh v. Hutchinson*, was an action for goods sold and delivered; the defence, coverture. The defendant's husband was an Englishman, who, about 10 years before this action was brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period, he became possessed of madder grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland, in 1795, his employment as agent having ceased, he sent the defendant, together with

(12) "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been holden liable, the husband being an Englishman." Per Heath, J. in *Marsh v. Hutchinson*. See also *Farrer v. Countess of Granard*, 1 Bos. and Pul. N. B. 80, where Heath, J. said. the case of *De Gaillon v. L'Aigle* proceeded much upon the ground of the defendant's husband being a foreigner.

his family, to reside in England, but he remained in Holland to look after his madder grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived at Aylsham, in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which this action was brought. It was holden, under these circumstances, that the husband's residence in Holland did not enable the wife to bind herself by her own contracts.

So where to a plea of coverture¹ the plaintiff replied, that the defendant's husband "lived and *resided* in Ireland, and that the defendant lived in this kingdom separate from her husband as a single woman, and as such single woman, promised, &c.;" the replication was holden bad on general demurrer, because the terms of it were perfectly consistent with a mere temporary absence, and they might be applied to the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here.

To trespass for breaking and entering the plaintiff's dwelling-house and shop² on the 8th April, 1807, and on divers other days, &c. and ejecting her from the possession thereof: defendant pleaded, that plaintiff, at the time of committing the trespasses, and thence continually, hitherto hath been, and still is, under coverture, of one Jos. Boggett, then and still her husband, and still alive. Replication, that before the committing the trespasses, the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, viz. to America, without leaving any means of necessary provision and support to plaintiff; and from the time of his departure hitherto, has not returned to this country, nor corresponded with or been heard of by plaintiff: and that during all that time, plaintiff has lived apart from her husband, and made contracts, and obtained credit as a single woman; and for her necessary support and maintenance, has during all that time, carried on the business of a merchant, as a single woman and sole trader, and as such was lawfully possessed of said dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto, has been and still is a subject of our lord the king, and that he has not at any time hitherto abjured this realm, or been exiled or banished, or relegated therefrom. On demurrer, the court listened

¹ *Farrer v. Countess of Granard*,
1 Bos. & Pul. N. R. 50.

² *Boggett v. Frisr*, 11 East, 301.

reluctantly to the argument in support of the replication, and gave judgment for the defendant on the authority of the preceding cases, observing, that the rule had been laid down in *Marshall v. Rutton*; it was capable of having exceptions engrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband not banished, or the like, had never been deemed sufficient.

III. Of Actions by Husband and Wife,

1. *Where the Husband and Wife must join.*
2. *Where the Husband must sue alone.*
3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election.*

1. *Where the Husband and Wife must join.*—IN real actions for the recovery of lands of the wife, the husband and wife must join*.

So in an action of waste, for waste committed on the land of the wife*.

So in detinue of charters of the wife's inheritance*.

In an action on a bond given to wife *dum sola*, husband and wife must join (13)*.

x 1 Bulst. 21.

y 7 H. 4. 15. a. s H. 6. 34.

z 1 Roll. Abr. 347. (R.) pl. 1.

a Per Ld. Hardwicke, C. J. in *Bates v. Dandy*, 2 Atk. 208.

(13) I am not aware of any solemn adjudication on this point, but the position is supported by the following authorities:

1. In *Fenner v. Plaskett*, Moor. 422.* it is laid, that for a debt due to the wife *dum sola*, husband and wife ought to join; but it is observable, that in Croke's report of this case, (Cro. Eliz. 459.) which is more full and accurate than Moor's, this dictum does not appear.

2. In 1 Roll. Abr. 347. (R.) pl. 3. it is laid down, that husband and wife ought to join in actions due to the wife before coverture; but there is not any authority cited.

3. Lord Hardwicke, C. in *Garforth v. Bradley*, 3 Vez. 676, 677.

* Cited by the court in *Weller v. Baker*, 2 Wils. 493.

Bond was given to wife during the coverture; the wife died; and then the husband sued upon the bond, as administrator to his wife; it was holden on demurrer, that the action was well brought^b.

* If an action is brought in respect of a personal wrong to the wife, as for the battery of the wife, the husband and wife must join (14); and the declaration ought to conclude

^b Day v Padroue, B R. Trin. 13 & 14 G 2. 2 M. & S. 296. n.

takes a distinction between choses in action, vesting in the wife before and after marriage, and continues the power of the husband to sue alone to those which vest during the coverture.

4. In Buller's N. P. 179. it is laid down, that a debt due to a man, in right of his wife, cannot be set-off in an action against him on his own bond; cites *Paynter v. Walker*, C. B. E. 4 G. 3.

5. Lord Kenyon, C. J. delivering the judgment of the court in *Milnor v. Milnes*, 3 T. R. 681. said, "It is extremely clear on the one hand, that the marriage gives to the husband all the personal estate which the wife has in possession, it is also clear on the other hand, that where a chose in action of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it *must* be brought in the names of both husband and wife." It may be observed, on this last case, (which was an action of trespass brought by a feme covert, without her husband, for an injury done to a personal chattel of the wife *dam sola*; to which, coverture of the plaintiff at the time of exhibiting the bill was pleaded in bar) that it was not necessary for the determination of this case to decide, that the action must be brought by husband and wife. It was only necessary to decide, in the first place, that the wife could not sue alone, upon which point there could not be any doubt, as the wife cannot in any of these cases sue alone; and 2dly, whether advantage could be taken of the wife suing alone by a plea in abatement, or a plea in bar; the question whether the husband might sue alone, was wholly irrelevant. It may be proper to add, that the court were of opinion, that the plea ought to have been in abatement.

6. This question was raised, but not decided, in the case of *Carr v Taylor*, 10 Ves. Jun. 578. before Sir W. Grant, M. R. who said, that there had been some doubt upon it at law.

I cannot conclude this note without observing, that, until the doubts which hang over this question are removed by a solemn adjudication, the best way of proceeding for the recovery of a chose in action of wife *dam sola*, is to bring the action in the names of husband and wife, on the propriety of which method a question cannot be raised.

(14) But in these cases the husband may sue alone for the 12-

“to their damage,” and not “to the damage of the husband”; for the damages will survive to the wife, if the husband die before they are received.

2. *Where the Husband must sue alone.*—Where the wife cannot maintain an action for the same cause, if she survives her husband, the action must be brought by the husband alone; as in the case of an action of *indebitatus assumpsit* for the labour, &c. of the wife, during the coverture*; for, in contemplation of law, the wife is considered as the servant of the husband, and he is entitled to her earn-

c Horton v. Byles, 1 Sidf. 397.
d Judgment arrested for this conclusion, in Newton & Ux. v. Hatter, Lord Raym. 1208.

c Buckley v. Collier, Salk. 114. and Carth. 251.

jury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery; Hyde v. Scissor, Cro. Jac. 538. And if the husband adopts this method, he may in the same declaration complain of a battery to himself. Guy v. Livesey, Cro. Jac. 501. Although the wife ought not to be joined in an action with the husband for the battery of the husband, (Newton v. Hatter, Lord Raym. 1208.) yet, where husband and wife join in an action for a personal wrong to the wife, the husband may declare also for an injury arising solely to himself *by way of aggravation of damages*; as, where in trespass by husband and wife, for false imprisonment of the wife, *per quod negotia domestica of the husband remanserunt infecta ad grave damnum ipsorum*. On motion, in arrest of judgment, the declaration was holden good; for although the husband and wife could not have declared jointly for the special damage resulting to the husband alone, if such damage had been the gist of the action, yet in this case, it having been laid for *aggravation of damages only*, the action was well brought; for trespass will lie for a matter jointly with other matters, for which singly an action could not have been maintained; as trespass will lie for entering the plaintiff's house, and *beating his servant*, without adding, “*per quod servitium amisit*”; for then it is considered as a continuation of the first trespass. Russell v. Corne, Lat. Raym. 1031. Salk. 119. 6 Mod. 127. S. C. So where in an action of assault and battery by husband and wife, it was stated in the declaration, that the defendant assaulted the wife, and driving a coach over, bruised her; and “*by reason thereof*,” the husband laid out divers sums of money in the cure, &c. After verdict for plaintiff, with entire damages, it was holden, on motion in arrest of judgment, that the gist of the action was the beating of the wife, and the expenses incurred by the husband were only in aggravation of damages: and Powell, J. observed, that if these had been omitted in the declaration, yet the surgeon's bill might have been given in

ings, and such earnings shall not survive to the wife, but go to the personal representative of the husband (15).

So in an action on the case for words^f, not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone. So in actions for injuries committed during coverture to personal chattels^g, which by law are vested in the husband; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land: for it grows by the industry of man, and consequently the property thereof is in the husband alone (16).

In all cases where the wife shall not have the thing^h, when it is recovered, either solely to herself, or jointly with her husband, but the husband only shall have it, there the husband shall sue alone.

An action on the case was brought by A. and B. his wifeⁱ

f Coleman v. Harcourt, 1 Lev. 140.
g Arundel v. Short, Cro. Eliz. 133.
h 1 Rol. Abr. 347, (Q) pl. 5.
i Bidgoul v. Way and Wife, on error,

in Exchequer Chamber, 2 Bl. R. 1236. cited in Morris v. Norfolk, 1 Taunt. 214.

evidence, in aggravation of damages. Todd v. Redford, 11 Mod. 264. See also Dix v. Brookes, Str. 61.

(15) It may here be observed, that, although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of the action, that is, where the defendant has derived profit or advantage from her labour or skill, and an express promise of remuneration is made by the defendant to the wife, if, in such case, an action is brought by the husband and wife jointly, and it is expressly stated in the declaration, that the promise was made to the wife, an objection cannot be raised to such declaration, merely on the ground of the wife having been joined; because contracts made by the wife, with the assent of the husband, are valid, and the bringing the action in their joint names is a declaration of such assent; and in this case the action would survive to the wife. Brashford v. Buckingham, in error, Cro. Jac. 77. 205. Care, however, must be taken, that the declaration does not embrace any other cause of action accruing to the husband alone; for if it does, it will be bad. Holmes and wife v. Wood, cited by the court in Weller v. Baker, 2 Wils. 424.

(16) Husband and wife being seized of land in right of wife may join in trespass, *quare cl. fregit, et herbam ibidem crescentem consumpsit et asportavit*, because the grass is the natural produce of the earth, and shall continually go with the land. Willy v. Hanksworth, B. R. M. 3 G. 2. MSS. and cited by the court in Weller v. Baker, 2 Wils. 424.

for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises to husband and wife; after judgment by default, writ of inquiry executed, and final judgment in B. R. a writ of error was brought in the Exchequer Chamber, assigning for error, that judgment was given for the husband and wife to recover their damages, whereas it appeared on the record, that B. was the wife of A. and could not sustain any damage by reason of any thing contained in the declaration; the court were of opinion, that the judgment was erroneous, because a contract could not be made with a married woman; that a promise, either express or implied, did not give any interest to her; the whole resulted to the husband, and the action ought to have been brought in his name (17). The counsel for the defendants in error having urged, that, if an impossible assumpsit was stated in the declaration, it might quoad her be surplusage, as much as if she had been a stranger; the court said, the insertion of the wife could not be surplusage; for it created an interest in her, and entitled her to damages by survivorship.

Where a debtor to the wife as executrix promises to pay the husband in consideration of his giving time of payment, the husband ought to sue alone, because the wife is not a party to the agreement between her husband and the defendant^a; but in this case the life of the wife must be averred^b. N. The recovery of the husband will amount to a *devastavit pro tanto*. Per Holt, C. J. Carth. 463.

3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election.*—In personal actions for the recovery of damages only, (other than actions in respect of personal wrongs to the wife,) where the action will survive to the wife (18), the husband and wife may join^c; or

^k *Yard v. Elmd*, Lord Raym. 363. ^l *Lea v. Minde*, Yelv. 84. Cro. Jac. 110.

^m Per Cur. & Med. 270.

(17) Lord Ellenborough C. J. speaking of this report in *Ord v. Fenwick*, 3 East's R. 190. said that the declaration was not stated sufficiently explicit; that it did not appear *whose* lands had been used and occupied, whether the husband's or wife's.

(18) In *Prosdike v. Sterling*, 1 Freeman. 236. North, C. J. said, "that he always took it for an unquestionable rule, that, where-so-ever, in case the husband should die, the action would survive to the wife, there the wife might join, but on the other side, the husband

the husband may sue alone, for he alone may release such action (19).

Assumpsit.—In an action for a breach of promise made to husband and wife after coverture, to pay a sum of money to the wife, husband and wife may join^m.

So where a promise is made to the wife onlyⁿ.

Covenant.—Where a lease is granted to husband and wife for a term of years, and the lessor ousts them, husband and wife may join in an action of covenant^o.

Queen Elizabeth, by letters patent, demised a house to A. for years, who covenanted to repair^p, and afterwards, during the term, the queen granted the reversion to husband and wife, and to the heirs of the husband in fee; the house being out of repair, the husband alone brought covenant, and it was holden well, although the interest of the feme appeared on the face of the declaration (20).

Covenant will lie by husband and wife for non-payment of rent, due by virtue of a lease granted by husband and wife of lands, the inheritance of wife^q.

Husband alone may bring an action on a covenant made to himself and his wife, for, although the covenant be made to both, yet he may refuse quoad her^r.

In this case North, C. J. said, that he remembered an authority in an old book, that, if a bond be given to baron and feme, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her^s.

Debt.—So if a bond be given to husband and wife administratrix^t, husband may sue alone, declaring on it as a bond to himself.

^m Hilliard v. Hambridge, Alevs. 36.

ⁿ Prat v. Taylor, Cro. Elis. 61. 1. Rol.

Abr. 32. pl. 28.

^o Bro. Abr. Baron and Feme, pl. 23.

^p Brett v. Cumberland, Cro. Jac. 309.

Buls. 163. S. C.

^q Aleberry v. Walby, Str. 930.

^r Beaver v. Isaac, 2 Mod. 217.

^s Cited by Buller, J. 4 T. R. 617.

^t Ankerstein v. Clarke, 4 T. R. 616.

may join the wife in many cases where he is not bound to join her, but may have the action alone."

(19) "What the husband alone may discharge, and of which he may make disposition to his own use, he may recover alone without joining his wife in the action." Per Dodderidge, J. to which Coke, C. J. assented, and said it was a true and good ground, 3 Bulst. 164.

(20) But see Middlemore v. Goodall, Cro. Car. 505.

In debt on bond made to husband and wife^a both may join; or the husband may disagree to the wife's right to the bond^x, and bring the action in his own name only; but, until such disagreement, the right to the bond is in both the husband and wife, and shall survive: hence, if the husband dies, the wife shall have the bond, and not the personal representative^y of the husband.

So in debt on bond made to the wife *during* coverture^z, or in assumpsit on a promissory note given to the wife *during* coverture^x, husband and wife may join; or husband may sue alone (21); but after the death of wife, husband must sue as administrator to his wife^b.

Where husband and wife have recovered judgment on a bond made to wife, *dum sola*, husband and wife may join in an action^c on such judgment; or husband may sue alone: for that which was before a chose in action, *transit in rem judicatam*, and is of another nature from what it was before the coverture.

If it be referred to a master in chancery to take an account of what is due to husband and wife^d, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes, the husband and wife may join in an action against the warden for the escape.

Quare impedit.—So where a right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly^e.

Or the husband may sue alone^f, for the presentation only is recoverable and not the advowson, and the release of the husband would bar the action.

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| a 39 E. 3. 5. 43 E. 3. 10. Bro. Baron and Feme, pl. 14. 55. | b Day v. Padroue, B. R. Trin. 13 and 14 G. 2. 2 M. and S. 396. n. |
| x Coppin v. — 2 P. Wms. 497. | c Woolverston v. Fyningmore, T. 19 & 19 G. 2. C. B. MSS. |
| y Bro. Baron and Feme, pl. 60. | d Huggins v. Durham, Str. 726. |
| z Howell v. Maine, 3 Lev. 403. S. P. per Ld. Hardwicke, 2 Atk. 208. | e Bro. Bar. and Feme, pl. 41. |
| a Philliskirk and wife v. Pluckwell, 2 M. & S. 293. | f lb. pl. 28. |

(21) It appears by a MS. note in the possession of a friend of the compiler, that the roll in *Howell v. Maine* was searched, and it was found that the bond was given to the wife *during* the coverture; for *devant*, therefore, in some editions of Levin's report, read *durant*. Comyns has stated the case accurately in his Digest, tit. Baron and Feme. (w)

Replevin.—Baron and feme may be joined in the same declaration in replevin for goods distrained from the feme *dum sola*^g.

If the goods of a feme sole be taken, and she marries, the husband alone may sue the replevin^h.

In the replevin of goods which the wife has as executrix, husband and wife shall join, *ut videtur*ⁱ.

Avowry for rent arrear *jure uxoris* may be by husband and wife, or husband only, averring the life of feme^k.

Tort.—In an action upon the case for stopping a way to the land of the wife, husband and wife may join^l.

So an action upon the case for cutting down trees^m, the lops of which were reserved to the wife for her life, may be brought by husband and wife jointly.

In *Weller and wife and others v. Baker*, 2 Wils. 414. an action was brought by the dippers at Tunbridge Wells, together with their husbands, against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute; it was holden, that the action was well brought in the names of the husbands and wives.

Trespas.—Trespas was brought by the husband alone for hunting in a free warrenⁿ, which he had in right of his wife, and it was adjudged good, for damages only are recoverable (22).

Trover.—Where the inception of the cause of action is in the wife before marriage^o, and consummated afterwards, husband and wife may join, as in trover of a personal chattel of wife before, and conversion thereof after marriage.

It must be observed, that, in all the preceding cases, where

g Bro. Baron and Feme, pl. 85.

h F. N. B. 159. *Id.* cited in Bull. N. P. 53.

k Bro. Baron and Feme, pl. 85.

l *Wise v. Bellent*, Cro. Jac. 449. *Osborne v. Wallerden*, 1 Mod. 273.

i Agreed in *Baker and wife v. Breeman*, Cro. Car. 418.

m *Tregmiell and Wife v. Reeve*, Cro. Car. 437.

n Bro. Abr. Baron and Feme, pl. 16.

o *Blackburn v. Graves*, 2 Lev. 107.

(22) It may be remarked here, that it is immaterial as to the point in question, whether the interest of the husband is a joint interest with the wife, or an interest only in right of the wife. In the first and second cases in covenant before abridged, the husband had a joint interest with the wife. In the 4th case in covenant, two first cases in tort, and the case to which this note is annexed, the husband had an interest only in right of his wife.

the wife is made a party, her interest ought to appear on the face of the declaration, for the court will not intend it upon demurrer^p, or even after verdict, according to the case of *Abbott v. Blofield*, Cro. Jac. 644. Sed quæ. whether this case be law to its full extent, for in *Bourn and wife v. Mattaire*, Bull. N. P. 53. and MSS. where husband and wife joined in replevin, and defendant avowed for rent arrear, after verdict, it was objected, that the husband and wife could not have a joint property in personal chattels after the marriage, and, consequently, the replevin ought to have been brought by the husband alone. Lord Hardwicke, C. J. delivering the judgment of the court, said, that, although the ground of the objection was generally true, yet, notwithstanding, as a man and woman might have a joint property before marriage, or the wife might have the goods in question as executrix, and the taking might in both cases be before marriage, the court were of opinion, that they might declare jointly in an action for such taking. That if the law would admit of such joint action, the fact was admitted by the pleading. The defendant had not disputed with the plaintiff to whom the property belonged at the time of the taking, and therefore if there could be a case in which husband might join with the wife in an action for a personal chattel, the court thought that, *after verdict* (23), this ought to be intended to be the case, *Bro. Bar. and Feme*, pl. 85. abridges a book case in 33 Edw. 3. (but which is not to be found in the year book, and was probably taken from some manuscript) wherein it is held, that husband and wife may join for such things as the wife has as executrix, or where goods are taken from her whilst sole.

IV. *Of Actions against Husband and Wife.*

IN actions against the husband for the debts of the wife contracted before marriage^q, if the wife is not joined, advan-

^p *Serres v. Dodd*, 2 N. R. 405. *infra*. u. ^q *Mitchinson v. Hewson*, 7 T. R. 348. (23.)

(23) Since the publication of the former edition of this work, it has been decided, that a declaration in replevin by husband and wife, where nothing appears on the face of the record whence the court can infer that the wife had an interest in the goods taken, is bad, on special demurrer. *Serres and wife v. Dodd*, 2 N. R. 405.

tage may be taken of the omission in arrest of judgment; and this rule holds, although an account has been stated with the husband^r, for that does not alter the nature of the debt.

As a husband *de facto* is liable to the debts of his wife^a, a plea of *ne unques accouple en loyal matrimonie* to an action brought against husband and wife, for the recovery of a debt due from wife before coverture, is bad.

Husband cannot be charged at law for money lent to his wife, even for the purpose of buying necessaries; because it may be misapplied (24).

But a count for money lent to the wife at the request of the husband is good^t, because a loan to the wife at the request of the husband is considered in law as a loan to the husband (25).

So where the plaintiff declared, that the defendant was indebted for meat^u, &c. found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife, at his request, in his absence; upon a case reserved, it was holden, that a delivery to the wife, at the husband's request, was in law a delivery to the husband.

If a declaration against husband and wife, for a debt of the wife contracted before marriage, allege a promise of the wife made after the marriage to pay the debt, it is bad^x.

If an action is brought against husband and wife on a bond

^r *Drue v. Thorue*, Alyn, 72.

^s *Norwood v. Stevenson*, Andr. 227.

^t *Stevenson v. Hardy*, 2 Wils. 308. 2 Bl. R. 872. S. C.

^u *Ross v. Norl*, C. B. E. 31 G. 2. Bull. N. P. 136.

^x *Morris and wife v. Norfolk and another*, 1 Taunt. 219.

(24) If the money be laid out in necessaries, equity will consider the lender as standing in the place of the person providing the necessaries, and decree relief. *Harris v. Lee*, 1 P. Wms. 482. *Preced.* in Chan. 502. S. C. and *Hutchinson v. Standly*, Lord Bathurst, C. H. T. 1776. MSS.

(25) "It is true that a complete or perfect contract cannot be made by a feme covert by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior and communicated to the defendant, the contract made is an actual contract and not merely *virtual* with the husband; if subsequent, then the wife's contract is *inchoate* and *imperfect*, until affirmed by the husband; and such affirmation, if given, transfers the contract to him." Per Blackstone, J. in *Stevenson v. Hardie*, 2 Bl. R. 873.

given by the wife *dum sola*^y the defendant may plead the bankruptcy of the husband after the intermarriage, &c. as a discharge of the debt. This plea upon the statute must conclude to the contrary. Husband and wife cannot maintain an action of trover, and suppose the possession in them both; for the law will transfer the whole interest to the husband: but trover may be maintained *against* husband and wife^z; for the gist of the action is the conversion, which is a tort, with which a feme covert may be charged as well as with trespass.

Trespass against J. G., widow^a, and pending the suit she took husband; after judgment, a writ was directed to the sheriff *quod caperet J. G. ad satisfaciendum*, upon which the sheriff took J. G. whose husband, together with her, thereupon brought an action for false imprisonment against the sheriff, who justified under the *ca. sa.* On demurrer, the court gave judgment for the defendant, observing, that if an action be brought against a feme, who before judgment takes husband, yet, if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband.

In like manner, after interlocutory judgment in assumpsit against a feme^b, who afterwards marries, the plaintiff, even after notice of the marriage, may proceed to final judgment, without joining the husband, and sue out execution thereon against the feme only, and such execution cannot be set aside for irregularity.

Judgment was obtained against a feme sole^c, who afterwards married, and then the plaintiff brought a *sci. fa.* against husband and wife, and had judgment thereon; then the wife died, and the plaintiff afterwards brought another *sci. fa.* against the husband alone: it was holden, on writ of error, that the second *sci. fa.* was well brought, on the ground that the judgment on the first *sci. fa.* had made the husband liable.

If wife be joined in an action for words spoken by husband only, it will be error^d. Hence if slander be spoken by husband *and* wife, there must be separate actions, one against the husband only, for the slander spoken by him, and the other against the husband and wife, for slander spoken by

y Miles v. Williams, 1 P. Wms. 249.
said by Lord Hardwicke in 2 Vesey,
181. to be truly reported.

z Draper v. Fulkes, Yelv. 165.

a Doyley v. White, Cro. Jac. 323.

b Cooper Huchin, 4 East's R. 521.
See 3 M. and S. 557.

c Obrian v. Ramm, Carth. 30. See the
record, 3 Mod. 170.

d Swithin v. Vincent, 2 Wils. 297.
Dyer, 19 a. pl. 112. in the margin.

the wife, and the court will not order the actions to be consolidated.

So for words spoken of husband and wife there must be two actions; one by the husband for the words spoken of the husband, and another by husband and wife for the words spoken of the wife*.

The policy of the common law will not permit husband and wife to give evidence *for* each other^f, because their interests are the same: nor *against* each other on account of the implacable dissention which might be occasioned thereby. But by stat. 21 Jac. 1. c. 19 s. 5, 6. commissioners of bankrupt are empowered to examine the wives of bankrupts touching their *estates*.

c Errington v Gardiner, B. R. M. 22 G. 3. M. S. See Smith v. Warner, Goldsb. 76. Dalby v. Dorthall, Cro. f Cur. 553 Anon. W. Jones, 440. Smith v. Cooker, W. Jones, 409. Davis v. Digmoody, 4 T. R. 678. Bull. N. P. 390.

CHAP. IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Of the Nature of a Bill of Exchange.*
- II. *Of the Capacity of the contracting Parties to a Bill of Exchange.*
- III. *Of the Requisites in a Bill of Exchange, and herein of the Stamp, Date, and Consideration.*
- IV. *Presentment for Acceptance—Acceptance—qualified Acceptance—Liability of the Acceptor—Non-acceptance, and Notice thereof—Protest—Liability of the Drawer on Non-acceptance.*
- V. *Of the Transfer of Bills of Exchange—Of the Party in whom the Right of Transfer is vested.*
- VI. *Of Presentment for Payment, and herein of the Days of Grace—Non-payment and Notice thereof—Protest.*
- VII. *Of the Acts of the Holder whereby the Parties to the Bill may be discharged.*
- VIII. *Of the Action on a Bill of Exchange—Evidence—Recovery of Interest.*
- IX. *Of the Nature of a Promissory Note—Stat. 3 and 4 Ann. c. 9. s. 1. placing Promissory Notes on the footing of Inland Bills of Exchange—What are negotiable Notes within the Statute—Of Bankers' Notes—Joint and several Notes—Consideration—Stamp.*
- X. *Of the Time when a Note ought to be presented for Payment.*
- XI. *Of the Declaration—Pleadings—Evidence—Conclusion.*

I. *Of the Nature of a Bill of Exchange.*

A BILL of exchange is a written order from A. to B. directing B. (who has, or is supposed to have, in his hands sufficient effects belonging to A.) to pay a sum of money to C. or order, or to C. or bearer, either at sight, or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand.

The peculiar properties of a bill of exchange are these: First—It is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*: contrary to the general rule of law, that choses in action are not so assignable. Secondly—Although a bill of exchange be merely a simple contract, and not a specialty, yet it will be presumed that it has been originally given for a good and valuable consideration.

Bills of exchange are either foreign or inland; foreign bills of exchange have long been considered as the most convenient paper security among merchants*, in conformity to the universal usages and customs established among traders, by unanimous concurrence, for facilitating a general commerce throughout the world.

The person making the bill is called the *drawer*, the person to whom it is directed the *drawee*, and the person in whose favour it is made the *payee*. When the drawee has undertaken to pay the bill, he is stiled the *acceptor*, and his undertaking to pay the bill is called an *acceptance*.

Bills of exchange payable to order are assignable by indorsement. The person making an indorsement is called the *indorser*: the person, in whose favour it is made, the *indorsee*, the party in possession of the bill, and entitled to receive its contents, the *holder*.

Bills payable to bearer are transferrable by delivery without indorsement^b.

Where the drawee refuses to accept, a stranger, after protest for non-acceptance, may accept for the honour of the drawer, and thereby such stranger acquires certain rights, and subjects himself to the same obligations as if the bill had been directed to him. So a stranger may become a party to a bill, *paying* it after protest for non-payment, either for the honour of the drawer or indorsers.

* Postleth. Dict.

^b Grant v. Vaughan, 3 B. & B. 1516.

Although regularly there ought to be three persons concerned in a bill of exchange, viz. drawer, drawee, and payee, yet there may be only two; that is, the characters of drawer and payee may be united in the same person^c, as if A. draw a bill in this manner, "Pay to me or my order £ Value received by myself."

A bill of exchange is a simple contract^d, and consequently is within the statute of limitations; and must be sued for within six years after it becomes payable.

Bills of exchange for value received^e, are not such matters of account as are intended by the exception in the statute of limitations concerning merchants' accounts.

A bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a devastavit.

If a merchant in London draws a bill of exchange on his correspondent in Newcastle^f, in favour of J. S., and the bill is refused, and J. S. dies intestate, his administrator, on letters of administration taken out at Durham, cannot bring an action on the custom of merchants against the drawer, and lay the same in London, because a bill of exchange is not equal to a bond or specialty, which are the deceased's goods where they happen to be at his death, but is a simple contract which follows the person of the debtor, and makes *bona notabilia* where the debtor resides, and therefore administration ought to be taken out in London.

II. *Of the Capacity of the contracting Parties to a Bill of Exchange.*

ALL persons, whether merchants or not, if they have capacity to contract, may be parties to a bill of exchange. This appears from the case of *Sarsfield v. Witherly*, Carth. 82. in which it was decided, that the act of drawing a bill of exchange constituted the drawer a merchant, within the custom of merchants, so as to make him responsible to the holder upon non-payment.

Corporations, by the intervention of their agents may be

c Per Holt, C. J. in *Buller v. Cripps*, 6 Mod. 30. e *Chevely v. Bond*, Carth. 220.

d *Renew v. Axton*, Carth. 3.

f *Ycomans v. Bradshaw*, Carth. 373

parties to a bill of exchange; but by stat. 6 Ann. c. 22. s. 9. and 15 Geo. 2. c. 13. s. 5. it shall not be lawful for any body politic or corporate, other than the governor and company of the Bank of England, or for any other persons, united in covenants or partnership, exceeding the number of six persons, in England, to borrow or take up any sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of exclusive banking granted to the governor and company of the Bank of England.

Infant.—An infant cannot bind himself by a bill drawn in the course of trade^g, or even for necessities^h. But infancy is a personal privilege, of which the infant alone can avail himself. Hence it has been holden, that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the actionⁱ (1). And if a bill be accepted by a party after he is of full age, he will be liable, although the bill was drawn on him while an infant^k.

A feme covert cannot bind herself by drawing a bill of exchange.

This proposition falls within the general rule of law, which permits married women to avoid all contracts made by them during their coverture. To this rule there are some exceptions, which are stated under title Baron and Feme, Sect. II.

The interest in a bill of exchange or note given to a feme covert, vests in her husband, and he must indorse it.

An action was brought by the indorsee against the maker of a promissory note^l. The first count of the declaration was upon the note, to which were added the money counts. It appeared that the note had been given by the defendant to a married woman, with knowledge of her coverture, to the

g Williams v. W. Harrison & R. Harrison, Carth. 166. l Grey v. Cowper, D. R. E. 22 Geo. 3. 418.
h Williamson v. Watts, 1 Camp. N. P. C. 552. Sir J. Mansfield, C. J. k Stevens v. Jackson, 4 Camp. 101.
i Barlow v. Bishop, 1 East's R. 422.

(1) In like manner the *acceptor* of a bill of exchange cannot set up the infancy of the drawer as a defence to an action brought at the suit of the indorsee. Taylor v. Croker, 4 Esp. N. P. C. 187; and per Lord Hardwicke in Haly v. Lane, 2 Atk. 181-2. S. P. So, though a note given by a wife to a husband is void; yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good. Ibid.

intent that she should indorse it to the plaintiff, which was done accordingly, in payment of a debt which she owed him (in the course of carrying on trade in her own name with the consent of her husband). The plaintiff had dealt with her as a feme sole. It was holden, that the property in the note vested in the husband by the delivery to the wife, and that her indorsement did not transfer any interest to the plaintiff; consequently he was not entitled to recover on the special count; nor on the money counts, because no money had passed between the plaintiff and defendant.

But if a promissory note is made payable to a married woman, and she indorses it for value in her own name^m, and the maker afterwards promises to pay it, in an action against him by the indorsee, it will be presumed, that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff.

Bills of exchange may be drawn, accepted, or indorsed, by means of the agent or attorney of the party (2). An agent or attorney for this purpose may be constituted by parol (3). In such case the principal is said to draw, accept, or indorse by procuration. Agents should be cautious how they accept bills directed to them personally, and not to their principals, although such direction describe them in their official characters; for in such case, if they accept in their own name, they will become personally responsible, as appears from the following case:

The plaintiff was indorsee of a bill of exchange, drawn from Scotland upon the defendant in these wordsⁿ; "At thirty days sight pay to J. S. or order 200*l.* value received of him, and place the same to account of the York Buildings' Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings' Company, at their house in Winchester-street, London. Accepted per H. Bishop." The bill not having been paid, an action was brought against defendant upon his acceptance; at the trial he

^m Cotes v Davis, 1 Camp. N. P. C. 485.

ⁿ Thomas v. Bishop, Str. 955. Ca Temp Hardw. 1. S. C.

(2) Many persons, under disabilities in other respects, may act as private attorneys, such as infants, femes covert, persons attainted, outlawed, excommunicated, aliens, &c. 1 Inst. 64*a*.

(3) The holder of a bill may authorise another person to indorse his name on it, by parol, per Holt, C. J. at N. P. 12 Mod. 564.

proved, that the letter of advice was addressed to the company; and that, the bill having been brought to their house, defendant was ordered to accept it, which he did in the same manner as he had accepted other bills. Page, J. directed the jury to find for the plaintiff, which they did accordingly. On motion for a new trial the court held the direction right: "for the bill on the face of it imported to be drawn on the defendant, and it was accepted by him *generally*, and not as servant to the company, to whose account he had no right to charge it until actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit evidence arising from extrinsic circumstances—as the letter of advice. *And this differed widely from the case of a bill addressed to the master, and underwritten by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master.* A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. In this case there was nothing in writing to bind the company, nor could any action be maintained against them upon the bill: for the addition of cashier to defendant's name was only to denote the person with certainty; the direction to whose account to place it, was for the use of the drawee only." Judgment for the plaintiff (4).

Partners.—By the custom of England^o, where there are joint-traders, and one of them accepts a bill drawn on them *for himself and partner*, such acceptance binds all the partners, if it concerns the trade; otherwise, if it concerns the acceptor only in a separate and distinct interest.

If a bill of exchange is drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership^p. So if A. B. and C. are in partnership, and A. draws a promissory note, by which he promises *individually* to pay the money, and which he signs with his own name only, but prefixing to his signature "*for A. B. and C.*" this binds the whole partnership^q.

o Pinkney v. Hall, Salk. 196.
p Mason v. Rumsey, 1 Camp. N. P. C. 384.

q Ld. Galway v. Matthew, 1 Camp. N. P. C. 403.

(4) One who covenants for *himself, his heirs, &c.* under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the declaration as covenantee *for and on the part and behalf* of such other person. Appleton v. Binks, 5 East's R. 149.

Where there are several partners it is competent to either of them, by his indorsement, in the name of the firm, to pass their interest in the bill^r; and such indorsement made by one partner for the satisfaction of his separate debt, cannot be questioned in an action by the indorsee against the acceptor, without shewing that the indorsement was at the time unknown to or unauthorised by the other partner^s. But if a creditor of one of the partners collude with him to take security for his individual debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if it be taken *bona fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner, in giving such security, can disaffirm the act.

If a bill is sent into circulation after the dissolution of a partnership^t, all the partners must join in the indorsement, and one by putting the partnership name thereon cannot bind the rest (5); for the moment the partnership ceases, the partners become distinct persons; from that time they are tenants in common of the partnership property undisposed of. In like manner, after a secret act of bankruptcy committed by one of two partners^u, the other, cannot by an indorsement in the name of the firm transfer the property in a bill, which belonged to the firm before the bankruptcy; for, the partnership having ceased to exist, the solvent part-

^r Swan v. Steele, 7 East, 210. Arden v. Sharpe and another, 2 Esp. N. P. C. 534. Wells v. Masterman, 2 Esp. N. P. C. 731.

^s Ridley v. Taylor, 13 East, 173.

^t Abel v. Sutton, 3 Esp. N. P. C. 108. Kenyon, C. J.

^u Ramsbottom v. Lewis, 1 Camp. N. P. C. 279.

(5) Indorsee v. Defendant as one of the drawers of a bill of exchange, the other drawers having become bankrupts*:

The bill was drawn in the firm of "James King and Co." under which firm the defendant and his partners had traded. It appeared that there were other partnerships carried on under the same firm, in which the other drawers were concerned, but in which the defendant had no share. The defendant offered to shew that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it. Lord Kenyon, C. J. was of opinion that the defendant was nevertheless liable; he had traded with the other persons under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment.

* Baker and others v. Charlton, London Sittings after Trinity Term 31 Geo. 3. B. R. Peake's N. P. C. 80.

ner is to be considered as tenant in common with the assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective indorsements.

III. *Of the Requisites in a Bill of Exchange, and herein of the Stamp, Date, and Consideration.*

In order to prevent any mistake in the manner of penning this instrument (although to constitute a bill of exchange there is not any precise form required*) a foreign and inland bill of exchange are subjoined in the proper form:

Foreign Bill.

London, 1st January, 1806.

Stamp.

Exchange for 10,000 Livres Tournoises^y.

At two usances (or "at sight," or "after date") pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. of order ("or bearer") ten thousand Livres Tournoises, value received of them, and place the same to account as per advice from

JAMES OATLAND.

To Mr. in Paris, }
payable at }

* Per Car. Ld. Raym. 1397.

y Chitty, 37.

Inland Bill.

£100

London, 1st January, 1816.

Stamp.

At sight (or "on demand," "at _____ days
after sight" "at _____ after date") pay to Mr.
or order ("or bearer") one hundred pounds for value re-
ceived.

SAMUEL SKINNER.

To Mr. _____ merchant in }
Bristol, payable at }

With respect to these bills of exchange, the following
rules must be observed:

A bill of exchange must *not* purport to be payable out of
a particular fund, which may or may not be productive^a, or
upon an event which may not happen; for it would perplex
the commercial transactions of mankind, if paper securities
were issued into the world incumbered with conditions
and contingencies, and if the persons to whom they were
offered in negotiation were obliged to inquire at what
time these uncertain events would probably be reduced to
a certainty.

The following cases will illustrate this position:

An action was brought by payee against drawer of a writ-
ten instrument in these words^a:

"Seven weeks after ~~date~~ pay A. B. £ _____ out of
IV. Steward's money as soon as you receive it."

It was objected "that it was payable out of a supposed
fund at a future time, which was uncertain and might or
might not happen." The court gave judgment for the de-
fendant; and De Grey, C. J. said, that the instrument or
writing which constituted a good bill of exchange, accord-
ing to the law, usage, and custom of merchants, was not
confined to any certain form of words, yet it must have
some essential qualities, without which it was not a bill
of exchange; it must carry with it a personal and certain
credit given to the drawer, not confined to credit upon
any *thing* or *fund*; that the payee or indorsee took it upon

2. *Jenney v. Herle*, 1 Ld. Raym. 1362. *Stevens v. Hill*, 5 Esp. N. P. C. 247.

a. *Dawkes and another v. Ed. De Lorraine*, 3 Wils. 207. 2 Bl. R. 732. S. C.

no particular event or contingency, except the failure of the general credit of the person drawing or negotiating the same (6).

So where a bill was drawn by an officer upon his agent, requesting him to pay out of *his growing subsistence*, it was^b holden not to be good, because the fund was uncertain.

So a request to J. S. to pay £ out of the monies in J. S.'s hands^c, belonging to the proprietors of the Devonshire mines, was holden not to be a bill of exchange, because it was uncertain, whether the fund would be sufficient to pay it (7).

So an order to pay money out of the fifth payment when it should become due, and it should be allowed by the drawer^d.

The same principle was recognized in the following case, although the instrument was holden to be a good bill of exchange.

J. S. on 25th May, 1724, drew a bill on J. N. and directed him, one month after date, to pay A. B. or order £ as his quarter's half-pay from 24th June, 1724, to 25th September following: The court were of opinion, that this was a good bill of exchange; for it was *not* payable upon a contingency *nor* out of a particular fund, and was made payable at all events; and was drawn upon the general credit of the drawer, not out of the half-pay; for it was payable as soon as the quarter began for the half pay mentioned in the bill, which was not to be due till three months after. The mention of the half-pay was only by way of direction to the drawee, how he should reimburse himself.

b Josselyn v. Lacier, argued P. 1 Geo.

1. B. R. 10 Mod. 294. adjudged in the same term, 10 Mod. 316. Fort. 981. S. C.

c Jeane v. Herle, B. R. on error from C. B. Str. 591. and more fully reported in 8 Mod. 265. Lord Raym. 1261, and 11 Mod. 384. Leach's edit.

d Haydock v. Lynch, on demurrer to declaration, Ld. Raym. 1563.

e Macleod v. Snee, E. 13 Geo. 1. B. R. on error from C. B. Lord Raym. 1481. Str. 762. and 11 Mod. 400. Leach's ed.

(6) So where the instrument declared on was, "Pay A. B. one month after date £ on account of the freight of the *Veale Gallej*." It was objected, that it was an order upon a particular fund, and on this ground, Lee, C. J. ruled it not to be a bill of exchange. Bapbury v. Lisett, London Sitings, Str. 1212.

(7) The reason it was held not to be a bill of exchange, in Jenney v. Herle, was because it was no more than a private order to a man's servant. Per Cur. in Macleod v. Snee, Str. 762.

Of the Stamp.—A bill of exchange cannot be given in evidence^f, nor is it in any manner available, unless it be duly stamped; that is, not only with a stamp of the proper value, but also with a stamp of the proper denomination, or the peculiar stamp appropriated to this species of instrument by the legislature.

The amount of the stamp duties on bills of exchange is at this time (1816) regulated by stat. 55 Geo. 3. c. 184. as follows,

Inland bill of exchange, draft, or order, to the bearer or to order, either on demand or otherwise, not exceeding two months after date or sixty days after sight, of any sum of money,

	Duty		
	£	s.	d.
Amounting to 40s. and not exceeding 5l. 5s.	0	1	0
Exceeding 5l. 5s. - - - - - 20l.	0	1	6
Exceeding 20l. - - - - - 30l.	0	2	0
Exceeding 30l. - - - - - 50l.	0	2	6
Exceeding 50l. - - - - - 100l.	0	3	6
Exceeding 100l. - - - - - 200l.	0	4	6
Exceeding 200l. - - - - - 300l.	0	5	0
Exceeding 300l. - - - - - 500l.	0	6	0
Exceeding 500l. - - - - - 1000l.	0	8	6
Exceeding 1000l. - - - - - 2000l.	0	12	6
Exceeding 2000l. - - - - - 3000l.	0	15	0
Exceeding 3000l. - - - - -	1	5	0

Inland bill of exchange, draft, or order, for the payment to the bearer or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money,

Amounting to 40s. and not exceeding 5l. 5s.	0	1	0
Exceeding 5l. 5s. - - - - - 20l.	0	2	0
Exceeding 20l. - - - - - 30l.	0	2	6
Exceeding 30l. - - - - - 50l.	0	3	6
Exceeding 50l. - - - - - 100l.	0	4	6
Exceeding 100l. - - - - - 200l.	0	5	0
Exceeding 200l. - - - - - 300l.	0	6	0
Exceeding 300l. - - - - - 500l.	0	8	6
Exceeding 500l. - - - - - 1000l.	0	12	6
Exceeding 1000l. - - - - - 2000l.	0	15	0
Exceeding 2000l. - - - - - 3000l.	1	5	0
Exceeding 3000l. - - - - -	1	10	0

Inland bill, draft, or order, for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf,

The same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bill, draft, or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom

The same duty as on a bill payable to bearer, or order, on demand, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite

The same duty as on a bill on demand for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money, within the intent and meaning of this schedule, viz.

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money; where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons for money received, which shall entitle or be intended to entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

Foreign bill of exchange (or bill of exchange drawn in but payable out of Great Britain) if drawn singly and not in a set - - -

The same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100l. .	-	£	s.	d.
		0	1	6
Exceeding 100l. and not exceeding 200l.	-	0	3	0
200l. - - - - - 500l.	-	0	4	0
500l. - - - - - 1000l.	-	0	5	0
1000l. - - - - - 2000l.	-	0	7	6
2000l. - - - - - 3000l.	-	0	10	0
Exceeding 3000l.	-	0	15	0

Exemptions from the preceding and all other Stamp Duties.

All bills of exchange, or bank post bills, issued by the governor, and company of the Bank of England.

All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner of the navy, under the 35th year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn pursuant to any former act of parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.

The legislature having in contemplation the mistakes, which might arise in the use of stamps of an improper denomination, has by stat. 37 Geo. 3. c. 136. made provision for those mistakes; for, by the 5th section of that statute it is

enacted, that bills and notes made after the passing this act, and liable to a stamp duty by stat. 31 Geo. 3. c. 25. if stamped with a stamp of a different denomination than is required by the last mentioned act, may, if the same be of *equal* or *superior* value to the stamp required, be stamped by the commissioners on payment of the duty and penalty; that is, by sect. 6. of the 37th Geo. 3. c. 136. the penalty of forty shillings, if the bill or note is produced to the commissioners, *before* it is payable, and ten pounds, if so produced *after* it is payable.

Since this statute of 37 Geo. 3. it has been determined^g that a promissory note drawn before the 37th Geo. 3. c. 136, upon a receipt stamp of equal value with that required for a promissory note, is not available in law (8).

By stat. 43 Geo. 3. c. 127. s. 6. it is enacted that every instrument^h, matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, &c.

Where partners resident in *Ireland* signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B. in England for his use, who filled up the blanks and negotiated it: held that this was to be considered a bill of exchange by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessaryⁱ.

Indorsee of a bill of exchange, against the acceptor^k. It appeared at the trial, that the bill, which was drawn on a proper stamp, was originally dated on the 2nd September 1793, payable *twenty-one* days after date; and, while it con-

g *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 30. i *Snaith v. Mingay*, 1 M. & S. 97.

h See *Farr v. Price*, 1 East's R. 35. and Taylor v. Hague, 2 East's R. 414.

k *Bowman v. Nichol*, 5 T. R. 537.

(8) The act of 37 Geo. 3. c. 136. is a clear legislative declaration, that it is not sufficient, that a certain sum of money be paid on the instruments which are the subjects of taxation, but the stamp used must be of the proper denomination. Per Sir J. Mansfield, C. J. delivering the opinion of the court in *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 33.

It may be observed that by stat. 31 Geo. 3. c. 25. bills and notes were forbidden to be stamped after they were made.

tinued in the hands of the drawer, it was altered with the consent of the acceptor, to be made payable *fifty-one* days after date, and afterwards with the like consent was again restored to *twenty-one* days after date, and the date brought forward from the 2nd to the 14th September. This last alteration was made on the 30th September, the bill being then over due according to the original tenor of it; after these alterations, it was negotiated, and came into the hands of plaintiff. *Lord Kenyon*, C. J. nonsuited the plaintiff, and, on a motion to set aside the nonsuit, the court were clearly of opinion, that the nonsuit was proper; for that at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that therefore there ought to have been a new stamp.

The plaintiff declared as indorsee of a bill of exchange against the acceptor¹, and it appeared that the bill in question which was drawn by Giles and Co. on the 3rd of June, 1807, payable to their own order, and accepted by the defendant at 3 months' date, was exchanged by him with Giles and Co. for their acceptance of a bill drawn by the defendant for the same sum at 85 days payable to his order, the object being that Giles and Co. should put the defendant in cash before his acceptance became due. On the 23rd of June, before Giles and Co. or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23rd of June, instead of the 3rd. The court were of opinion, that the alteration rendered a new stamp necessary; observing, that the delivery of the bill by the drawer to the acceptor, and the re-delivery of it for a valuable consideration, such as the exchange of acceptances, has been held to be since *Cowley v. Dunlop*, 7 T. R. 565. a negotiation of the bill; that the several drawers were mutual purchasers of each other's acceptances; and as the alteration was made, while the bill was in this course of negotiation, and after it had continued so 20 days (during which time it was in the power of the drawer and payee to have passed it to any third person) it was in effect drawing a new bill. So where a promissory note, payable by the defendant to the plaintiff or order^m, was originally expressed to be *for value received*, but the day after it had been signed and delivered by defendant to plaintiff it was by consent of the parties altered by the addition of the words *for the good will of the lease and trade*

¹ *Cardwell v. Martin*, 9 East, 190. See also *Baths v. Taylor*, 15 East, 412. S. P.

in *Knill v. Williams*, 10 East, 431.

of *Mr. F. K. deceased*; it was holden, that as the alteration was material, as well because it was evidence of a fact, which if necessary to be inquired into must otherwise have been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder upon inquiring, whether that consideration had passed; and as such alteration was made after the note had issued, a new stamp was necessary.

But an objection on the ground of the insufficiency of the stamp cannot be taken after payment of money into court^a.

Omission of Date.—Regularly every bill of exchange ought to be dated; but in the following cases where the day of the date was omitted in the declaration, the court said they would intend the bill to bear date on the day when it was made (9).

Case on a foreign bill of exchange payable at double usance from the date^b, and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the defendant. Exception, that the date of the bill was not set forth. The court said, that they would intend the bill dated at the time of drawing it. Judgment for plaintiff.

So, where in the first count of the declaration it was stated^c, that the defendant heretofore, to wit, on the 15th day of September, 1800, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The 2nd count stated, that the defendant afterwards to wit, on the same day and year aforesaid, drew a certain bill of exchange payable two months after date. On writ of error, after judgment by default, it was objected, that the 2nd count could not be sustained; because the date of the bill was not stated; that, although in *De la Courtier v. Bellamy* the court held, that it might be intended, that the date of the bill was the day of the drawing, yet there the day of drawing was expressly stated; whereas in this case, it was to be collected only from words of reference to the first count, in which the day of drawing was laid under a "to wit."

^a *Israel v. Benjamin*, 3 Camp. N. P. C. 40.

^b *De la Courtier v. Bellamy*, B. R. H. 36 & 37 Car. 2. s Show. 432.

^c *Hague v. French*, Exchequer Chamber, in error. T. 42 Geo. 3. 3 Bos. & Pul. 173.

(9) A date is not of the substance of a deed, for if it want a date, or have a false or impossible date, as the 30th of February, yet the deed is good. *Goddard's case*, 2 Co. 5. a.

But the court were of opinion, that this case was not distinguishable from *De la Courtier v. Bellamy*, and that they might well intend the date to have been the day of drawing stated in the first count.

The defendant, on the 4th May, 1810, drew a bill of exchange, which he dated on the 11th May, 1810, payable sixty-five days after date, and delivered it to the payee, who after indorsing it for a valuable consideration to the plaintiff on the 5th of May, died on the same day. It was holden, that the plaintiff was entitled through this indorsement to recover against the drawer^q.

Alteration of Date.—A bill of exchange was drawn on defendant on the 26th March, 1788, payable three months after date to J. S. and accepted by defendant^r. After acceptance, and while the bill remained in the hands of J. S. the payee, the date of the bill was altered by some person unknown, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of defendant; J. S. the payee afterwards indorsed the bill so altered to the plaintiffs for a valuable consideration. It did not appear, that plaintiffs knew of the alteration at the time when the bill was indorsed to them. Payment having been refused, plaintiffs sued the defendant as acceptor. The declaration contained two special counts, (one on a bill dated the 20th March, 1788, the other on a bill dated the 26th March, 1788,) and the money counts. Special verdict. The case was argued twice in B. R. after which the court gave judgment for defendant (Buller, J. dissentient), on the ground that the alteration of the instrument had avoided it. Lord Kenyon, C. J. said, "I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of the payee, who was then entitled to the amount of it, and from whom plaintiffs derive title: and it was for the advantage of the payee (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost consequence. The cases cited, which were all of deeds, were decisions which applied to, and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions which were indeed confined to deeds, applied to the then state of affairs; but they establish

^q *Peamore v. North*, 13 East, 517.
^r *Master and others v. Miller*, B. R. T. 31 Geo. 3. 4 T.R. 320. affirmed on error in Exchequer Chamber, 2 H. Bl. 141. recognized in *Powell v.*

Divett, 15 East, 32. where Le Blanc, J. says, "that the decision in *Master v. Miller*, was not confined to negotiable instruments."

this principle, that all written instruments which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted, so lately as in the reign of George the first, in Ward's case, 2 Str. 747. and 2 Ld. Raym. 1461., whether forgery could be committed in any instrument less than a deed, or other instrument of like authentic nature; and it might equally have been decided there, that as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held, that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. It has been contended that no fraud was intended in this case; at least, that none is found: but I think that if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant. On the whole I am of opinion, that this falsification of the instrument has avoided it.—*Ashhurst, J.* concurred in opinion with Kenyon, C. J.—*Buller, J.* gave an elaborate opinion in favour of the plaintiff.—*Grove, J.* said, "From Pigot's case, 11 Rep. 27. which is the leading case, I collect, 1st. that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded it was not his deed: and 2ndly, that when a deed is altered in a material point by himself, or even by a stranger, without the privity of obligee, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. In reading that, and the other cases cited, I observe that it is no where said, that the deed is void merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too, appears to me as applicable to one kind of instruments as to another. But it has been

contended, that there is a difference between an alteration of bills of exchange and deeds: but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for £100, and after acceptance the same was altered to £1000; it is not pretended that the acceptor shall be liable to pay the £1000; and I say, that he cannot be compelled to pay the £100, according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill (10). And the alteration in every respect prevents the instrument continuing the same as well when applied to a bill as to a deed. I do not think that the plaintiffs can recover on the general counts, because it is not stated as a fact in the verdict, that the defendant received the money, the value of the bill." Judgment for defendant.

(10) So if the word "date" be inserted, instead of the word "sight," *Long v. Moore*, London Sittings after H. T. 30 G. 3. Kenyon, C. J. 3 Esp. N. P. C. 155. But a mere correction of a mistake, as by inserting the words, "or order," in furtherance of the intention of the parties, will not vitiate the bill. *Kershaw v. Cox*, London Sittings after M. T. 41 G. 3. Le Blanc, J. So where two persons being jointly indebted to another, agreed to give him a bill of exchange to be drawn by one of the debtors, and accepted by the other, instead of which they sent him a promissory note, made by the one and indorsed by the other, which he immediately returned to be altered into a bill of exchange, which was done accordingly; it was holden, that such alteration, only fulfilling the terms of the agreement, might be considered as the correction of a mistake, and did not render a new stamp necessary, the instrument never having been negotiated as a promissory note. *Webber v. Maddocks*, 3 Camp. N. P. C. 1. See *Cole v. Parkin*, 12 East, 471. So if the alteration be not in the time of payment, sum, &c. or other material part, the bill will not be affected by it. Hence, writing on the bill the place where it was to be paid, has been holden not to destroy the validity of the bill. *Trapp v. Spearman*, London Sittings after M. T. 40 G. 3. Kenyon, C. J. 3 Esp. N. P. C. 57. So where in an action by the indorsee, against the acceptor of a bill, it appeared that, after the bill had been accepted by the defendant, the words "Prescott and Co." had been written under his name by the drawer, without his knowledge or assent, the plaintiff having refused to take the bill unless these words were added. Lord Ellenborough held, that as the addition of these words did not alter the responsibility of the acceptor, he was still liable. *Marson v. Petit*, 1 Camp. N. P. C. 82. n.

If upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered; although the drawer and indorser are thereby discharged, yet if the holder acquiesces in such alteration and acceptance, the bill will be good as between the holder and acceptor¹. But if, after a bill has been drawn and indorsed, and before it is accepted, the drawee alter it by postponing the time of payment, it renders the bill void¹.

Of the person to whom the bill is made payable.—Regularly a bill of exchange ought to be made payable to a real person, but if it be drawn payable to a fictitious payee or order, and indorsed in his name, *by concert between the drawer and acceptor*, it will be considered as a bill payable to bearer, and may be declared on as such in an action by an innocent indorsee for a valuable consideration against the drawer—*Collis and others v. Emmet*, 1 H. Bl. 313.; or against the acceptor—*Gibson and another v. Minet and another*, 1 H. Bl. 569. But see contr. the opinions of *Eyre, C. J.* and *Heath, J.* 1 H. Bl. p. 598, 625. with whom *Lord Thurlow, Ch.* concurred. But if the circumstance of the payee being a fictitious person is unknown to the acceptor², he cannot be declared against on the bill, either as a bill payable to bearer, or to the order of the drawer.

Words "or order."—The negotiability of a bill of exchange depends on its being made payable to A. or order (11), or to A.'s order, or to A. or bearer. See post. on the transfer of bills of exchange. A bill payable to A.'s order is the same as if it were made payable to A. or order³, and may be de-

¹ *Paton v. Winter*, 1 Taunt. 420.

² *Bennett v. Farnell*, 1 Camp. N. P.

³ *Outhwaite v. Luntley*, 4 Camp. 179.

⁴ *C. 130.*

⁵ Per *Holt, C. J.* 12 Mod. 510.

(11) In *Hill v. Lewis*, Salk. 133. exception was taken that a bill was payable to defendant only, without the words, "or his order," and therefore not assignable by the indorsement: and *Holt, C. J.* agreed that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words "or his order," give authority to the plaintiff⁶ to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the indorsement of a bill which has not the words, "or to his order," is good or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee.

⁶ *Q. Payre.*

clared on, without alledging that A. did not make any order for the payment of the bill to any other person⁷.

"Value received."—It is not *essentially* necessary to insert the words "value received" (12). But if they are omitted in inland bills, the holder cannot avail himself of the provisions of 9 & 10 W. 3. c. 17., and 3 & 4 Ann. c. 9. s. 4.

A bill of exchange is *presumed* to be made upon a good and valuable consideration; and in actions not between immediate parties some suspicion must be cast on the plaintiff's title before he can be compelled to prove what consideration he has given for it. A mere notice given by the defendant to the plaintiff, that he will be required at the trial to prove the consideration, is not sufficient to cast this burthen on the plaintiff⁸. When suspicion is cast on the plaintiff's title by shewing that some previous holder has been defrauded out of it, the plaintiff must prove what consideration he gave for it⁹. In actions between immediate parties (13), the illegality or want of consideration^c may be insisted on by way of defence to an action on the bill. In other cases, bills of exchange are made void by express statute.

y Smith v. McClure, 5 East's R. 376.

z White v. Ledwick, B. R. P. 25 Geo. 3. on demurrer to the declaration Bayley's Treatise of Bills of Exchange, &c. App. No. 3. Per Lord Ellenborough, C. J. in Grant v. Da Costa, 3 M. and S. 352. The case in Bayley does not state whether it was an inland or a foreign bill. I am not aware that there is any distinc-

tion except that which I have pointed out, which is founded on the statute of Wm.

a Reynolds v. Chettle, 2 Camp. N. P. C. 596. Clarke v. Lihot, B. R. London sittings, after M. T. 52 G. 3 S. P.

b Rees v. M. of Headfort, 2 Camp. N. P. C. 574.

c Puget de Bras v. Forbes, 1 Esp. N. P. C. 117.

(12) A jury of merchants were of opinion, in *Banbury v. Lisset*, Str. 1211, that the words, "value received," were essential to the validity of a bill of exchange.

(13) "As between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud;" per Ashhurst, J. in *Lickbarrow v. Mason*, 2 T. R. 71. See an anonymous case in *Chancery*, Comyns, 43. where Sommers, Lord Keeper held, that the drawer of a bill of exchange, though given without consideration, was not entitled to relief against a third person, to whom it was assigned for a just debt. See also *Snelling v. Briggs*, Bull. N. P. 274. where it is said, that it seems a reasonable distinction which has been taken between an action between the parties themselves, in which evidence may be given to impeach the promise, and an action by or against a third person, viz. an indorsee or an acceptor. See also *Puget de Bras v. Forbes* and another, C. B. London Sittings after M. T. 33 Geo. 3. coram Loughborough, C. J. 1 Esp. N. P. C. 117.

By stat. 9th Ann. c. 14. s. 1. "All notes, bills, &c. where the whole or any part of the consideration shall be for money or other valuable thing, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game, or by betting on the sides of such as game, or for repaying any money knowingly lent for such gaming, or lent at the time and place of such play, to any person that shall play or bet, shall be void (14) to all intents and purposes."

The 12 Ann. stat. 2. c. 16. s. 1. by which it is enacted that all bonds, contracts, and assurances, made for payment of any principal or money lent, upon usury, shall be utterly void, has been considered as standing on the same ground as the foregoing statute of the 9th of Ann. c. 14. against gaming, and on the authority of the case of *Bowyer v. Bampton*, (which see *infra*) it has been holden^d that the indorsee of a bill of exchange, given for an usurious consideration, cannot maintain an action upon it against the acceptor, although he (the in-

d *Lowe and others v. Waller*, Doug. 537.

(14) See *Robinson v. Bland*, 2 Burr. 1077. where a bill of exchange given for money lost at play, and money lent at the time and place of play, was holden to be void. See also the case of *Bowyer v. Bampton*, Str. 1155. where it was holden that an innocent indorsee for a valuable consideration, without notice, could not maintain an action on a promissory note given for money knowingly lent to game with at dice. But the statute 9 Ann. c. 14. only avoids securities for money won or lost at play, and does not extend to cases of mere loans without any security taken; and stat. 16 Car. 2. c. 7. s. 3. only avoids contracts for money lost at play; consequently an action for money lent may be maintained, although it should appear, that the money was lent by the plaintiff to the defendant, for the purpose of gaming with him. (*Barjeau v. Walmsley*, Str. 1249. per Lee, C. J.) or to pay a bet at a horse race, (*Alcinbrook v. Hall*, 2 Wils. 309.) or at the time and place of play (*Robinson v. Bland*, 2 Burr. 1077. *Wettenhall v. Wood*, 1 Esp. N. P. C. 18. S. P. per Kenyon, C. J.) It is to be observed, that although there is not any substantive clause in the stat. 9 Ann. c. 14. which avoids the contract, yet the 2nd sect. of that stat. gives the loser a power to recover back money or goods, of the value of £10 lost at any unlawful game, by action brought within 3 months; but after the expiration of the 3 months the loser cannot recover such goods or money from the winner, although the winner can show no title to them except what arises from having won them. *Vaughan v. Whitcomb*, 2 N. R. 413. And money fairly lost at play must be recovered in an action founded on the statute; it is not sufficient to sue in debt at common law for money had and received. *Thistlewood v. Cracroft*, 1 Maule and Selwyn, 500.

dorsee) has given a valuable consideration for the bill, and is not affected with notice of the usury (15).

It is to be observed, however, that the foregoing statute applies to those cases only where the bill is *originally* given for an usurious consideration^a, for if the bill is fair and legal in its inception, an indorsement by the payee for an usurious consideration will not avoid it in the hands of a subsequent *bonâ fide* holder; but if a bill be drawn upon an agreement between one of the original parties to it, and a person not a party to it^c, that the latter shall get it discounted by another person likewise not a party to the bill, upon usurious terms, and it is so discounted accordingly; the bill is void for the usury, in the hands of an innocent indorsee; and in such case the bill is void, although the drawer, to whose order it is payable, be not privy to the usurious agreement^e.

If an usurious security be given for a legal subsisting debt, although the security is void, the debt is not extinguished^b.

^a Parr v. Eliason and others, 1 East's R. 92. See also Daniel v. Cartony, 8. P. per Kenyon, C. J. Middlesex Sitting, 1 Esp. N. P. C. 274.
^f Young v. Wright, 1 Camp. N. P. C. 139.

^g Ackland v. Pearce, 2 Camp. N. P. C. 599.
^b Phillips v. Cockayne, 3 Camp. N. P. C. 119.

(15) Wilmot, J. seems to have anticipated this decision in an opinion delivered by him as one of the judges appointed by a special Commission of Errors, to inspect the judgment of the Sheriff's Court, in the case of Harrison against Evans, and the affirmance thereof in the Court of Hustings, at the Guildhall of the city of London, on the 5th of July, 1762; his words are these "it was said that the law against gaming makes notes 'void to all intents and purposes,' and the act against usury only makes them 'void,' and that a gaming note in the hands of an innocent indorsee would be void against the drawer, but it would not be so in the case of a note given upon an usurious contract; and it was determined in the case of a gaming note, that it would be void in the hands of an indorsee; but if that case is right, which was then thought a hard one, I think the law must be the same upon an usurious note; and no case was cited, either before or since the case upon the gaming note, to establish such a distinction; and I am sure I can find out none in the intention of the legislature between 'void,' and 'void to all intents and purposes.' It is only an ampliation of expression, and spreading out the same idea a little more diffusively; but they both equally mean, that the act done shall be considered as if it was not done." See notes of opinions, &c. by Wilmot, C. J. p. 146, 7.

Where a party is *compelled* to take goods in discounting a bill of exchange, a presumption arises that the transaction is usurious; and to rebut this presumption, evidence must be given of the value of the goods by the person who has supplied the goods¹ and sues on the bill. But where in discounting a bill a proposal is made that goods shall be taken, although such proposal originate with the plaintiff, yet if the other party readily accedes to it, conceiving that he shall make a profit by the transaction, the presumption is, that the goods are charged beneath their value, and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the ground of usury².

Where a bill of exchange is partly given for an illegal consideration, the whole bill is void; as where a bill was given partly for money lent, and partly for spirituous liquors, and spirits mixed with water, furnished by the payee in small quantities, not amounting to 20s: at one time; it was holden, that although the stat. 24 G. 2. c. 40. s. 12. did not in terms avoid the security, yet it made the consideration in part illegal, and as the security was entire, it could not be apportioned³.

In cases where the illegality of the consideration is such as does not fall within the statutes against gaming and usury, the holder cannot be affected with the transaction between the original parties, unless he either had notice, or took the bill, *after it became due*, from a person who had notice of the illegal consideration for which the bill was given.

The cases of *Peacock v. Rhodes*, *Steers v. Lashley*, and *Brown v. Turner*, will illustrate this position.

Indorsee against drawers of an inland bill of exchange^m. The bill was drawn by the defendants upon Smith and others, payable to William Ingham or order; Ingham indorsed it to Daltry, by whom it was indorsed to Pinner, out of whose pocket it was stolen. The plaintiff received the bill from a stranger, calling himself William Brown, and indorsing the bill in that name to plaintiff, of whom he bought cloths and other articles in the way of plaintiff's trade. The defendants were strangers to the plaintiff, but he had before taken bills drawn by them which had been duly honoured.

i *Davis v. Hardacre*, 2 Camp. N. P. C. 375.

k *Combe v. Miles*, ib 553.

l *Scott v. Gillmore*, 3 Taunt. 326. But

see *Spencer v. Smith*, 3 Camp. N. P. C. p. 4 *contra*.

m *Peacock v. Rhodes*, Doug. 620.

Plaintiff declared, as indorsee of Ingham. On a case reserved, Lord Mansfield (after argument) delivered the opinion of the court. "The law is settled, that a holder coming fairly by a bill or note, has nothing to do with the transaction between the original parties, unless, perhaps, in the single case of a bill or note for money won at play (16). I do not see any difference between a note indorsed in blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them and have found it was received in the course of trade." *Postea* to plaintiff.

Indorsee against acceptor of a bill of exchange drawn by one Wilson on defendantⁿ, and indorsed over by Wilson to the plaintiff after it had been accepted by defendant. At the trial before Kenyon, C. J. it appeared that defendant had engaged in several stock-jobbing transactions with different persons, in which Wilson was employed as his broker, and had paid the differences for defendant. That a dispute arising between Wilson and defendant respecting the amount of those differences, the matter was referred to plaintiff and three others, who awarded a sum of money to be due from defendant to Wilson, for part of which sum Wilson drew the bill in question. Kenyon, C. J. non-suited the plaintiff, being of opinion that as the bill grew out of a stock-jobbing transaction, which was known to the plaintiff, he could not recover upon it. A rule having been obtained to shew cause why the non-suit should not be set aside, Lord Kenyon, C. J. (after argument in support of the rule) said, "If the plaintiff had lent this money to defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle established in *Petrie v. Hannay* (17), 3 T. R. 418. he might have recovered; but here the

ⁿ *Steers v. Lashley*, 6 T. R. 61.

(16) *Bowyer v. Bampton*, Str. 1113, ante, p. 305. n. The case of *Lowe v. Walter*, had not been decided when Lord Mansfield delivered this opinion, otherwise he might have added here the case of a bill of exchange given for an usurious consideration.

(17) In the case of *Petrie v. Hannay*, it was decided, that if two

bill on which this action is brought was given for those very differences, and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff *he knowing* of the illegality of the contract between Wilson and defendant, for he was the arbitrator to settle their accounts, and under such circumstances he cannot be permitted to recover in a court of law." Rule discharged.

Indorsee of a bill of exchange against the acceptor°. The defendant employed one Pritchard, a broker, to transact some business for him in stock-jobbing in omnium, who paid the differences for him, and then drew the bill in question on the defendant for the amount of those differences, which the defendant accepted; afterwards, and *after the bill became due*, Pritchard indorsed the bill to the plaintiff for a prior debt. Lord Kenyon, C. J. was of opinion, 1st. That omnium was one of the public stocks or securities within the stat. 7 Geo. 2. (Sir John Barnard's act for preventing the infamous practice of stock-jobbing) the loan having been voted by the House of Commons, although the scrip receipts were not then in the market; and, 2dly, That the illegality of the original transaction vitiated the bill, the plaintiff having taken it after it became due, and consequently not being entitled to recover, if Pritchard could not (18). A verdict having been taken for

o Brown v. Turner, 7 T. R. 630.

persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other in an action for money paid to his use. But see Aubert against Maze, 2 Bos. and Pul. 373. where the authority of Petrie v. Hanmay was doubted.—Eldon, C. J.

(18) A party taking a bill of exchange or note after it is due, takes it subject to all the equity to which the party from whom he had it is liable. In Brown v. Davies, 3 T. R. 80. it was said by Buller, J. that generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him. To this position Kenyon, C. J. agreed, with the addition of this circumstance, that if it appeared on the face of the note to have been dishonoured, or if knowledge could be brought home to the indorsee that it had been so. See Mr. J. Lawrence's approbation of the foregoing rule in Boehm v. Sterling, 7 T. R. 431. In Taylor v. Mather, E. 27 Geo. 3. B. R. 3 T. R. 83. n. Buller, J. said, that it had never been determined that a bill or note was not negotiable.

defendant, an ineffectual attempt was made to set it aside, the court being clearly of opinion, on the construction of the act of parliament, and on the authority of the foregoing case of *Steers v. Lashley*, that the plaintiff was not entitled to recover.

IV. Of Presentment for Acceptance—Acceptance—qualified Acceptance—Liability of the Acceptor—Non-acceptance, and Notice thereof—Protest—Liability of the Drawer on Non-Acceptance.

Presentment for Acceptance.—When a bill is drawn pay-

after it became due, but if there were circumstances of fraud in the transaction, and it came into the hands of plaintiff by indorsement after it became due, he had always left it to the jury, upon the slightest circumstance, to presume that the indorsee was acquainted with the fraud. See also *Tinson v. Francis*, M. T. 28 Geo. 3. B. R. 1 Camp. N. P. C. 19. where the holder of a note had given a full consideration for a note after it became due, but was not permitted to recover in an action against the maker, the maker having proved that the note was originally made without consideration: Lord Ellenborough, C. J. observing, "that after a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered." But if the plaintiff has received the bill from a person who could have maintained an action on the bill, then the circumstance of the indorsement, after the bill became due, is not sufficient to let in the defence of an illegal consideration. *Chalmers v. Lanion*, 1 Camp. N. P. C. 385. Lord Ellenborough, C. J. whose opinion was afterwards confirmed by court of B. R. Whoever takes a bill after its dishonour, takes it with all the infirmities belonging to it, *Crossley v. Ham*, 13 East, 498. A bill paid at maturity cannot be re-issued, and no action can afterwards be maintained upon it by a subsequent indorsee; but if it be paid and indorsed before it becomes due, it will be a valid security in the hands of a *bona fide* indorsee. Per Lord Ellenborough, C. J. *Burbridge v. Manners*, 3 Camp. N. P. C. 194. If a bill of exchange, payable to the order of a third person who has indorsed it, be dishonoured when due and taken up by the drawer, it ceases to be negotiable. *Beck v. Robley*, 1 H. Bl. 29. n. But it is otherwise, if the bill be payable to the drawer's own order. *Callow v. Lawrence*, 3 M. & S. 95.

able within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawee for acceptance. In other cases, it is not essentially necessary for the holder to present the bill before it is due^a; but it is advisable to procure an acceptance, if possible; for, by that means another debtor is added to the drawer, who becomes a new security, and, consequently, makes the bill more negotiable. There is not any fixed time, when a bill, drawn payable within a certain time after sight, shall be presented to the drawee. But due diligence must be used (19), and care taken, that the bill be presented within a reasonable time.

Acceptance.—When the drawee accepts a bill in the most usual and formal manner, he writes on the bill the word “accepted,” and subscribes his name; or he writes the word “accepted” only, or he subscribes his name only. It has been frequently lamented, that this, which is the regular mode, has not been adjudged to be the only mode of accepting bills; for then every person to whom the bill passed would see, on the face of the instrument, whether it were accepted or not; but it has long been decided otherwise, viz. that an acceptance, or a promise to accept, by collateral writing, or even by parol, (except for the purpose of charging the drawer of an inland bill with damages and costs, see 3 & 4 Ann. c. 9. s. 5.) is equally binding with an acceptance on the face of the bill.

Defendant was sued as acceptor of a bill of exchange^b. It appeared in evidence to be a parol acceptance only; Lord Hardwicke, C. J. ruled it to be sufficient, that being good at common law, and the stat 3 and 4 Ann. c. 9. (see sect. 5 & 8.) which requires an acceptance to be in writing, in order to charge the drawer with damages and costs, having a proviso,

a Chitty, 67.

b Lumley v. Palmer, 2 Str. 1000. S. C.

more fully reported in Co. Temp. Hardw. 74.

(19) “The only rule which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether it be payable at or so many days after sight, or in any other manner.” Per Buller, J. 2 H. Bl. 560.

It seems that, whether due diligence has been used, is a question of law, but dependent upon facts, viz. the situation of the parties, their places of abode, and the facility of communication between them. See *Darbishire v. Parker*, 6 East’s R. 2.

that it shall not extend to discharge any remedy that any person may have against the acceptor; (after argument) the court of King's Bench agreed in opinion with the Chief Justice.

The drawer of a bill of exchange, having acquainted the defendant, by letter, of his having drawn a bill on him^c, and requested him to accept it; the defendant wrote in answer, that the bill *should be duly honoured*, and placed to his debit. Lord Hardwicke, Ch. held, that this amounted to an acceptance (20).^a

So where A., resident in America^d, not having any effects in the hands of the defendants (who resided in London), drew a bill on them, payable at a certain time after sight, which bill A., for a valuable consideration, indorsed to B., resident in America, who afterwards, for a valuable consideration, indorsed it to the plaintiffs, resident in London. The plaintiffs, on receiving the bill, presented it for acceptance, but the defendants refused to accept it. Afterwards, and before the bill became due, the defendants wrote a letter to A. the drawer, stating that their prospect of security being much improved, they *should accept or certainly pay* the bill; notwithstanding which, when the bill was presented for payment, the defendants refused to pay it. This letter was not received by the drawer in America until after the bill became due. It was holden, 1. That the terms of the letter amounted to an acceptance; for a promise to *accept* an existing bill was an acceptance, and a promise to *pay* it was also an acceptance, and consequently a promise to do the one or the other, i. e. *to accept or certainly pay*, could not be less than an acceptance; that supposing it to be an acceptance, the time when it was to be considered as made, namely, whether at the date of the letter, or at the time when it reached the drawer in America, was immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill was good (21); 2. That although the bill

^c Powell v. Monnier, 1 Atk. 611.

^d Wynne v. Raikes, 5 East's R. 511.

(20) It was said by Lord Ellenborough, C. J. in Wynne v. Raikes, 5 East's R. 520. that the authority of this case had not been (as far as the court had been able to find) ever shaken.

(21) Although, regularly, a bill ought to be accepted before the day on which the money is to be paid, yet an acceptance after that day will bind the drawee; and where, upon an acceptance so given, it was stated in the declaration, that the drawee promised to pay

was not taken by the holders upon the credit of the before-mentioned promise to the drawer, nor was the same known to them to have been made at all, till after the bill was due, yet the holders might avail themselves of it as an acceptance, for the same circumstances existed in the case of *Powell v. Monnier*; there the promise being long subsequent to the time when the plaintiffs became possessed of the bill by indorsement, could not have formed any part of their original inducement to take it; there, the promise was made to a drawer, who had drawn without having any effects in the acceptor's hands; and there also it did not appear that the holders, the plaintiffs, ever knew of the acceptance prior to the time when the bill became due. Consequently, on the authority of *Powell v. Monnier*, the plaintiffs in this case were entitled to recover.

A. having commissioned B. to receive certain African bills payable to A.^c, drew a bill upon B. for the amount, payable to his own order. B. assured A. by letter, that his bill *should meet with due honour*. The purport of this letter having been communicated to the plaintiffs, who, on the credit of it, advanced money on the bill to A. who indorsed it to them, it was holden, that B. was liable as acceptor in an action by the plaintiffs as indorsees, although after the indorsement, in consequence of the African bills having been attached in the hands of B. (who was ignorant of his letter having been shewn to the plaintiffs) A. wrote to B. advising him not to accept the bill when tendered; which advice would have been a discharge of B.'s acceptance, if the bill had still remained in the hands of A. (22). And Lord

*
c *Clarke v. Cock*, 4 East's R. 57.

the money according to the tenor and effect of the bill, the court refused to arrest the judgment on account of these words, observing, that the effect of the bill was the payment of the money, and not the day of payment; and at most they were but surplusage. *Jackson v. Piggett*, Carth. 459. Lord Raym. 364. and Salk. 127. See also *Mutford v. Walcot*, Lord Raym. 574. and Salk. 129. recognized by *Ellenborough, C. J.* in *Wyne v. Raikes*, 5 East's R. 691.

(22) An agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. If one man to give credit to another, makes an absolute promise to accept his bill, the drawer or any other person may shew such promise upon the exchange to get credit; and a third person who should advance his money upon it,

Ellenborough, C. J. said, "it has been laid down in so many cases, that a promise, *that a bill when due shall meet due honour*, amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject; then here was an undertaking by the defendant in writing, by a collateral paper, to accept the bill, which induced a credit, without which the plaintiffs would not have given value for it. The defendant has thereby enabled another, with truth, to assert, (and furnished him with the means of proving that assertion by the production of the defendant's letter,) that he had undertaken to accept the bill, which, in ordinary mercantile understanding, amounts to an acceptance, and by that, credit was attached to the bill. This acceptance, being by writing, comes within all the cases cited. It would be good according to some, even by parol, but that an acceptance is good by collateral writing, is clear from *Pillans v. Van Mierop*^f, and other cases."

The drawee of a bill of exchange having once refused to accept it, afterwards said to the holder "if you will send it to the counting-house again, I will give directions for its being accepted." It was held that he was not liable as acceptor, without proof that the bill was again sent back to the counting-house for acceptance^g.

A bill was drawn as follows^h: "To Mr. Withy; Sir, please to pay to Mr. Scot or order 30*l*. Thomas Newton." Scot indorsed to the plaintiff, who presented the bill to the drawee (the defendant) for acceptance, and the defendant underwrote thus, "Mr. Jackson, please to pay this note, and charge it to Mr. Newton's account, R. Withy."—It was insisted, that this was not an acceptance, for the defendant did not mean to become the principal debtor. It was only a direction to Jackson to pay 30*l*. out of a particular fund, and if there was not any such fund, the money was not to

^f 3 Burr 1663.

^g *Anderson v. Hick*, 3 Camp. N. P. C. 179.

^h *Moor v. Withy*, Bull. N. P. 270

would have nothing to do with the equitable circumstances which might subsist between the drawer and the acceptor. Per Lord Mansfield, delivering the opinion of the court in *Mason v. Hunt*, B. R. M. 20 G. 3. Doug. 299. See also *Pierson v. Dunlop* and another, Cowp. 571. and *Le Blanc, J.* in *Johnson v. Collings*, 1 East's R. 103. and Lord Ellenborough, C. J. in *Clarke v. Cock*, 4 East's R. 70.

be paid. But per Cur. the underwriting is a direction to Jackson to pay the sum, and it signifies not to what account it is to be placed when paid; that is a transaction between them two only, and this is clearly a sufficient acceptance.

In like manner it has been holden, that a letter, written after the bill was drawn¹, stating, that the holder might rest satisfied of payment, amounted to an acceptance.

It will be proper to remark here, that, in all the preceding cases, the bills were in existence at the time when the promises to accept were given. This circumstance ought always to be attended to; for a promise to accept a bill, to be drawn at a future time, has been holden not to amount to an acceptance.

Indorsees against the acceptor of an inland bill of exchange². A. having furnished goods to the defendant to the amount of the bill in question, applied to him for payment, when the defendant said, that if he would draw on him a bill at two months for the amount, he should then have money, and would pay it. A. afterwards drew the bill in question at two months, payable to his own order; but it was not presented to the defendant for acceptance, nor did he ever, in fact, accept it otherwise than as is before stated. A. the payee, having indorsed the bill, passed it to plaintiffs in discharge of an old debt; but there was not any communication at the time between the plaintiffs and defendant. A. becoming a bankrupt before the bill became due, defendant refused payment. Le Blanc, J. at Worcester assizes, being of opinion, that the promise of the defendant did not amount to an acceptance, nonsuited the plaintiffs. On a motion to set aside the nonsuit, (after argument in support of the rule, the counsel on the other side having been stopped by the court,) Lord Kenyon, C. J. said, this was a promise to accept a non-existing bill, and that he did not know by what law he could say that such a promise was binding as an acceptance. Grose, J. said, that by the general rule a chose in action was not assignable, except by the custom of merchants; that the assignment of a chose in action by a bill of exchange was founded on that law, and could not be carried further than that would warrant it, and that there had not been cited any authority to shew that by the law merchant a mere promise to accept a bill to be drawn in future, amounted to

¹ *Wilkinson v. Lutwidge*, Str. 618. & *Johnson and another v. Collings*, 1 Raymond, C. J. London Sittings. ² *East's R.* 98.

an actual acceptance of the bill when drawn. Per Cur. rule discharged.

Upon a request to A. to accept a bill¹, and draw upon B. for the sum, the mere act of drawing on B. does not amount to an acceptance.

A bill of exchange, drawn on the defendant, was left with him for acceptance by the plaintiff's clerk²; the next day he called for the bill, when the defendant returned it, saying, "There is your bill, it is all right." Lord Kenyon, C. J. ruled that these words could not by any implication amount to an acceptance; that they did not convey any evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary for the purpose of charging him as an acceptor.

When a bill has been accepted by the drawee, if another person accepts it also for the purpose of guaranteeing the first acceptor, the second acceptance is merely a collateral undertaking, and must be declared on as such; for there is not any custom of merchants authorizing a series of acceptors³.

A cancellation by a third person through mistake of an acceptance will not avoid the bill⁴.

Qualified Acceptance.—A qualified acceptance is, when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a *conditional* acceptance. The holder of the bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance, after which he is precluded from insisting upon it as an acceptance⁵ (23); but if the holder acquiesces in it,

1 Smith and another v. *Nissen and another, B. R. T. 26 G. 3. 1 T. R. 969. n Jackson v. Hudson, 2 Camp. N. P. C. 447.
o Raperv. Birkbeck, 15 East, 17.
m Powell & Jones, 1 Esp. N. P. C. 17. p Sproat v. Mathews, 1 T. R. 182.

(23) So if the acceptor of a bill cancels his acceptance^{*}, and the holder causes it to be noted for non-acceptance, he thereby precludes himself from contending, that an acceptance of a bill once made cannot be retracted in point of law. Whether an acceptance once made can be cancelled by the acceptor, while the bill remains in his hands, has not been solemnly decided. Lord Kenyon, C. J. is said to have determined at *nisi prius*, that it could not. See 6 East's R. 200, and 15 East, 20.

* Bentiack v. Dorrice, 6 East's R. 199.

then such an acceptance becomes absolute only on the performance of the condition (24), which must be averred in the declaration.

If a bill be accepted, payable at A.'s who is the acceptor's banker^q, the party taking such special acceptance, (which he is not bound to do) thereby impliedly agrees to present it for payment within the usual banking hours, at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. But eight o'clock in the evening will not be considered as an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill^r.

The following cases will illustrate the nature of qualified acceptances.

Defendant accepted a bill of exchange to pay it *when goods consigned to him*^s, and for which the bill was drawn, *were sold*. Plaintiff counted upon the custom of merchants. After verdict for plaintiff, it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of goods, was not within the custom of merchants or negotiable. But *the court* (after consideration) held it good; for though the plaintiff might have refused to take such an acceptance, yet he might submit to take it. And it would affect trade, if factors were not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods.

So where defendant accepted a bill of exchange *upon account of the ship Thetis, when in cash for the said vessel's cargo*^t, and the plaintiff averred, that at the day when the bill became payable, the defendant was in cash for the said ship's cargo; it was objected, in arrest of judgment, that the defendant was not liable by this conditional acceptance; but the court overruled the objection.

So an answer, that the bill would not be accepted till a navy

q Parker v. Gordon, 7 East, 395.

s Smith v. Abbott, Str. 1152.

r Barclay v. Bailey, 2 Camp. N. P. C. 1 Julian v. Shobrooke, 2 Wils. 9.

398.

(24) If an agreement to accept is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions. Per Lord Mansfield, C. J. delivering the opinion of the court in *Mason v. Hunt*, B. R. M. 20 G. 3. Doug. 269

bill was paid^a, was holden a conditional acceptance to pay when the navy bill should be discharged.

Whether an acceptance be conditional or absolute, is a question of law^a.

Defendant accepted a bill of exchange to pay part of the sum of money mentioned in the bill^b, this was holden to be valid, although it was contended, that such partial acceptance was not within the custom of merchants.

If the payee of a bill annexes a condition to his indorsement before the bill has been accepted, the drawee, who afterwards accepts it, is bound by that condition, and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor^c.

Liability of the Acceptor.—The acceptor, by reason of his acceptance, which is *primâ facie* evidence of his having, in his hands, effects of the drawer to answer the amount of the bill, is considered as the principal debtor, and primarily liable to all the parties to the bill; and an express agreement only will discharge him. The acceptor undertakes to pay the sum specified in the bill, and interest, according to the legal rate of interest where the bill becomes due; but his engagement does not extend any further; consequently the acceptor of a foreign bill is not liable for re-exchange^a. It never was doubted, that any party to the bill (except the drawer) might maintain an action against the acceptor, if the bill was not duly honoured. And in *Parminster v. Symons*, D. P. 22 February, 1748^b, it was solemnly determined, that the drawer of a bill of exchange (accepted generally by the drawee, having effects of the drawer in his hands, and protested by the payee for non-payment, and afterwards paid by the drawer) might maintain, in his own name, and without an assignment from the payee, a special action on the case against the acceptor, and recover the money so paid.

If the holder of a bill of exchange brings separate actions against the acceptor^a, drawer, and indorsers, at the same time, the court will stay the proceedings in any stage of

^a *Pierson v. Dunlop*, Cowp. 571.

^x *Sproat v. Mathews*, 1 T. R. 182.

^y *Wegerstoffs v. Kerue*, Str. 214.

^z *Robertson v. Kensington*, 4 Taunt.

30.

ⁿ *Woolsey v. Crawford*, 2 Camp. N. P. C. 445.

^b *Parminster v. Symons*, 4 Bro. P. C. 604. affirming judgment of the Court of King's Bench, which is reported in 1 Wils. 185.

^c *Smith v. Woodcock*, Same v. Dudley, 4 T. R. 691. Confirmed by Anonym. H. 40 G. 3. B. R.

and
the time
in the hands
3 Camp. N. P. C. 503.

(27) In *Walwyn v. St. Quintin*, 1 B. & P. 100, 1 Eyr. C. J. said, it might be a proper caution to be taken not to rely on it as a general rule, that if the drawer had no effect in the hands of the acceptor, notice was not necessary. The case of acceptances on the faith of consignments from the drawer in his own hand, and the case of acceptances on the ground of false statements or arguments, might be stated as exceptions, and there might be many others. See also *Clegg v. Cotton*, 3 Bos. & P. 235, where A., the agent in America of B. in England, drew a bill on B. and indorsed it to C., also residing in America, and gave it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. was to restore the same, whenever it should appear that the bill was not cashed from the bill. Acceptance and payment of the bill was made, but no notice was given to A.; held, that A. was not liable. Heath, J. observing, that no doubt the rule dispositive of the case proceeded on the ground of a supposed fraud; but that it was not applicable to a case where an agent drew upon his principal, unless under very particular circumstances. See for the subject the opinion of Ld. Ellenborough, C. J. in *Brown v. 15 East*, 221. and *Thackfay v. Blackett*, 3 Camp. N. P. C. 217. In this last case, Ld. E. held, that the drawer having effect of acceptor before bill became due, was entitled to payment, though he had not such effects at time of bill drawn. *Rucker v. Hiller*, 3 Camp. N. P. C. 217.

Notice to Indorser.—If the holder looks to the indorser for payment, it is incumbent upon him to give notice of the dishonour of the bill within a reasonable time, otherwise the indorser will not be liable.

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In *Blissard v. Hirst and another*, 5 Bur. 2670. it was held, that the indorser of a inland bill of exchange, who had neglected to give notice to his indorser of the drawer's refusal to accept until a month had elapsed, in the course of which the drawer became a bankrupt, could not recover against such indorser (26).

The holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, *without giving notice of non-acceptance*, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who not knowing of the laches took up the bill; it was holden, that his ignorance of the laches of the former holder did not entitle him to recover against the first indorser who set up such defence.

With respect to the drawer, it has been observed, that want of effects in the hands of the drawee, at the time of bill drawn, will supersede the necessity of notice, but with respect to the indorser, as he has not any concern with the accounts between the drawer and drawee, notice of non-acceptance must be given to him by the holder of the bill (29).

m Hammond v Dufrene, 9 Camp N. o Hopes v Alder, 6 East's R 16 m.
P. C. 146 Sec also post p 23.
a Eschille v Sowrby, 11 East, 114 p Rowen v Hardy, 12 East, 414 But
see Dunn v O'Kearffe, ante, p. 319

(28) Lord Mansfield, C. J. said, in this case, 5 Burr. 2672. that there was not any difference in this respect between an inland and a foreign bill.

(29) In *Tindal v. Brown*, 1 T. R. 167, an action was brought

although the drawer has not any effects in the hands of the drawee⁹ (30).

A subsequent promise by the indorser, is a waiver of the objection for want of notice², and it is immaterial whether such promise be made to the plaintiff, or to a third person, who held the bill at the time; but a subsequent proposal by the indorser to pay the bill by instalments, *made without knowledge of all circumstances* relative to the bill having been dishonoured, has been holden not to be a waiver of the objection for want of notice³.

It is observable, however, that the rule requiring notice to be given even to the indorser, is applicable only to fair⁴

q Goodell v. Dolley, 1 T. R. 719.
Wilkes v. Jacks, Peake's N. P. C. 202. & H. Per Kenyon, J.
r Peake's N. P. C. 202. Lundy v. Robertson, 7 East, 229. R. P. recognized in Jones v. Morgan, 2 Camp N. P. C. 475. See also Hoplev v.

Duff her, 15 East, 277 as to what shall be evidence of a waiver of the objection

s Potter v. Rayworth, 17 East, 417.

t Got' all v. Dolley, 1 T. R. 719

u De laet v. Atkinson, 2 H. Bl. 330.

by indorsee against indorser of a promissory note. The defendant had, within a reasonable time after default of payment of the note, received notice thereof from the maker; but the plaintiff, the holder, had not given the defendant notice until two days after the bill became due. On this ground the court held, that the plaintiff could not recover, and that due notice ought to be given by the holder himself to the indorser within a reasonable time after default of payment. Buller, J. observing, "that the purpose of giving notice to the indorser, is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. The notice by another person to the indorser, can never be sufficient; but it must proceed from the holder himself." The preceding case of Tindal v. Brown was cited by Eldon, Ch in *ex parte Barclay*, 7 Ves. jun. 598. and the same rule was applied by him to the case of the drawer, thereby over-ruling the opinion of Lord Kenyon, C. J. in *Shaw v. Croft*, Clinty, 98. and ante, p. 320. n. which case, however, was not noticed either in the argument or by the court in *ex parte Barclay*.

(30) The exception to the general rule dispensing with notice where there are not effects in the hands of the drawee, is confined to actions brought against the drawer, and the indorser is in all cases intitled to notice. Per Lord Kenyon, C. J. in *Wilkes v. Jacks*, Peake's N. P. C. 201.

transactions where the bill has been given for value in the ordinary course of trade (31).

In addition to notice, it was formerly holden, that an indorsee could not sue his indorser until he had demanded payment of the *drawer*, on the ground, that the indorser was only a warrantor for the payment of the drawer; but this doctrine has been overruled, and it is now settled, as well in the case of a foreign as in that of an inland bill, that such a demand is not necessary, as appears from the following cases.

Case on a foreign bill of exchange by an indorsee against the indorser*. On general demurrer, it was objected that plaintiff had not shewn a demand on the drawer, in whose default only the indorser warrants. After two arguments, the court was of opinion, that the declaration was good enough; that to require a demand upon the drawer, would be laying such a clog on these bills as would deter all persons from taking them; that as to the notion which had prevailed, that the indorser warrants only in default of the drawer, there was not any colour for it; for every indorser was in the nature of a new drawer, and at *nisi prius* the indorsee was never put to prove the hand of the first drawer.

The same point was ruled in the case of an inland bill of

x Bromley v. Frazier, Str. 441.

(31) In an action against the payee of a note, it appeared, that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing, that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew at the time that the maker was insolvent, it was holden, that the plaintiff was entitled to recover. *De Bert v. Atkinson*, 2 H. Bl. 336. So in *Sisson v. Thomlinson*, London sittings, 17th December, 1805. MSS. Lord Ellenborough, C. J. ruled, on the authority of the preceding case, that where the indorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he (the indorser) is not entitled to notice of the non-payment as a *bona fide* holder for a valuable consideration would be. But see *Smith v. Becket*, 13 East, 187. and *Brown v. Malley*, B. R. H. 52 G. 3. 15 East, 216. in which last case it was holden, that an indorser is entitled to notice of dishonour, although he has not received any value for his indorsement, if he did not know that the bill was an accommodation bill in its inception.

exchange, in *Heylin v. Adamson*, B. R.¹ M. 32 Geo. 3. 2 Burr. 669 (32).

Foreign bills of exchange ought to be presented to the drawee, by a notary public (to whom credit is given, because he is a public officer) and acceptance demanded¹. If the drawee refuses to accept the bill², then the notary ought to draw a protest for non-acceptance (33).

Protest.—A protest on an inland bill of exchange was not necessary until the latter end of King William's reign. The frequent delays of payment of such bills having been found to be very inconvenient in the course of trade and commerce, it was enacted by stat. 9 & 10 W. 3. c. 17. that "where bills of exchange (of 5*l*. or upwards, payable at a certain time after date³, and expressed to be for value received,) are drawn in, or dated at, any place in England, Wales, or Berwick-upon-Tweed, upon any persons of or in any other

y Per Buller, J. in *Leftley v. Mills*, 4 T. R. 175. a This act does not extend to bills payable after sight. *Leftley v. Mills*, 4 T. R. 170.
z Per Holt, C. J. 6 Mod. 29. Buller v. Cripps.

(32) There is a dictum of Lord Hardwicke, Ch. to the same effect in *Lake v. Hayes*, H. 1736. 1 Atk. 281. assigning the same reason, viz. that every indorser is as a new drawer.

(33) In *Cromwell and another v. Hyson*, 2 Esp. N. P. C. 511. Kenyon, C. J. ruled, that when notice of non-acceptance was given to the indorser of a foreign bill, it was not necessary that such notice should be accompanied with a copy of the protest for non-acceptance. The case of *Goostrey v. Mead*, Gilb. Evid. Ed. 1761. p. 79. and Bull. N. P. 271. seems to be at variance with this decision of Kenyon, C. J. A. drew a bill of exchange in the West Indies on T. in London, at 60 days sight, payable to W. or order; W. indorsed to G. who presented the bill to T., who refusing, G. noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to A., and also to his agent in the West Indies, acquainting them that the bill was not accepted. In an action brought against A. by G., on this case he was non-suited, "for by not sending the protest for non-acceptance, he made himself liable." The only way in which this case can be reconciled with Lord Kenyon's decision is, by considering the expressions used in the latter case, "not sending the protest," as meaning nothing more than "not giving notice of the non-acceptance." "The requiring a protest for non-acceptance is, not because a protest amounts to a demand, for it is only giving notice to the drawer to get his effects out of the hands of the drawee." Per Cur. in *Bromley v. Frazier*, Str. 442.

“ place, in such cases, after presentation and acceptance, by
 “ *underwriting* the bills under the parties’ hands, and after
 “ the expiration of three days^b after the time when the
 “ same shall be due, on refusal or neglect of payment thereof,
 “ the party, to whom the said bill is made payable, his agent,
 “ &c. may cause the same to be protested by a notary public,
 “ and in default of such notary, by any other substantial
 “ person of the place, in the presence of two witnesses; the
 “ protest to be written under a copy of the bill in the follow-
 “ ing form:”

*Know all men, that I, A. B. on the day of
at the usual place of abode of the said have demanded
payment of the bill, of which the above is the copy, which the
said did not pay : wherefore, I, the said
do hereby protest the said bill ; dated this day of*

By s. 2. "the protest is to be sent within fourteen days
"after the making thereof, or due notice given thereof to
"the party from whom the bills were received, who is (upon
"producing such protest) to repay the bills with all inter-
"est^c and charges from the day such bills were protested
"(34), sixpence only to be paid for the protest^d. In default
"or neglect of such protest or due notice, the person so fail-
"ing or neglecting shall be liable to all costs, damages, and
"interest" (35).

There not having been in the statute of W. 3. any provision for protesting inland bills, in the case of refusal by the drawee to accept them, by writing under his hand, the intention of that statute was entirely evaded, by the refusal of merchants and other persons to accept such bills by underwriting them; as a remedy for this defect, by stat. 3 and 4

b See 4 T. R. 170.

c If there be not any protest, interest is not recoverable against the draw- d 4 T. R. 170.

cr. Per Raymond, C. J. Harris v. Benson, Str. 910.

d 4 T. R. 170.

(34) This statute does not take away the party's action, where there is not any protest, to recover the amount of the bill; but it seems, that in such case he is not entitled to recover interest and charges. Per Holt, C. J. in *Brough v. Parkins*, Lord Raym. 993. The principal is recoverable without protest, per Lord Hardwicke, C. J. in *Lumley v. Palmer*, Ca. Temp. Hardw. 77.

(35) The statute here seems to give the drawer a remedy by action, against the party failing to make protest, for costs and damages. *Per Holt, C. J. in Brough v. Parkins, Lord Raym. 993.*

Ann. c. 9. s. 4. it is enacted (36), that "upon presenting such bills drawn for the payment of five pounds or upwards, in case the drawee should refuse to accept them by underwriting the same, the payee, his agent, &c. shall cause the same to be protested for *non-acceptance*, as in case of foreign bills of exchange. The protest to be made by such persons as are appointed by the stat. of W. 3. to protest for non-payment, and 2s. only to be paid for it."

Sect. 5. "Provided, that no acceptance of such bill shall be sufficient to charge any person, unless the same bill be underwritten or indorsed in writing thereupon (37), and if such bill be not so accepted, the drawer shall not be liable to pay any costs, damages, or interest, unless such protest be made for non-acceptance thereof, and within 14 days after such protest, the same be sent, or otherwise notice thereof be given, to the party from whom such bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due, the drawer shall not be liable to pay any costs, damages, or interest, unless a protest be made and sent, or notice thereof given, in manner and form above mentioned; nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest, upon such inland bill, if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left as aforesaid."

Sect. 7. "If any person accept any *such* bill (38) in satis-

c See stat. 9 & 10 W. 3. c. 17. s. 1. and 3 & 4 Ann. c. 9 s. 6.

(36) Lord Hardwicke, C. J. in *Lumley v. Palmer*, justly observed, that this statute was drawn very darkly.

(37) "If these words stood singly, it would be hard to say that any remedy lay against the acceptor by reason of a parol acceptance; but the generality of these words is restrained by the words that immediately follow, so that the first general words are only to be understood to relate to the charging the drawer with interest and costs." *Cas. Temp. Hardw.* 78. Per Lord Hardwicke, in *Lumley v. Palmer*.

(38) That is, a bill for 5*l.* or upwards, payable after date, and expressed to be for value received, see s. 4.

Formerly, a bill given in payment of a precedent debt, was not considered as payment, unless the money was paid by the drawee,

“faction of any former debt or sum of money, formerly due unto him, the same shall be esteemed a complete payment of such debt, if such person doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest, as aforesaid, either for non-acceptance or non-payment thereof.”

Sect. 8. “Provided, that nothing herein contained shall extend to discharge any remedy (39) that any person may have against the drawer, acceptor, or indorser of such bill.”

“In case any *inland* bills of exchange^f (for 5*l.* or upwards, payable at a certain time after date, and expressed to be for value received) be lost or miscarried within the time before limited for payment, the *drawer* shall give other bills of the same tenor with those first given, the persons to whom they shall be so delivered giving security to the drawer to indemnify him in case the bills shall be found again.”

The *indorsee* of a lost bill, where the bill has been indorsed in blank, cannot recover at law against the acceptor, although a sufficient indemnity is tendered^g; he must resort to a court of equity for relief^h. But where the bill lost had only a special indorsement upon it, an action may be maintained, without producing the billⁱ.

Liability of the Drawer on Non-acceptance.—If the drawee, on presentment for acceptance, dishonour the bill, the drawer may be called on for immediate payment (40). In

^f 9 & 10 W. 3. c. 17. s. 3.

^g *Pierson v. Hutchinson*, 2 Camp. N. P. C. 811.

^h See *Walmesley v. Child*, 1 Ves. 341. and *Exp. Greenway*, 6 Ves. jun. 812.

ⁱ *Long v. Bailie*, 2 Camp. N. P. C. 214. n. See also *Brown v. Messiter*, 3 M. & S. 281.

although the holder had neglected to present it for payment, or to give notice of non-payment. See 12 Mod. 203. *Ca. Temp. Holt*, 209. *Salk.* 124. See *Bishop v. Rowe*, 3 M. & S. 362.

(39) “The construction of this clause is, that it relates to the remedy for the principal sum in the bill, for these two acts (*viz.* 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9.) relate to and make a provision for protests, which are to be followed with interest, damages, and charges upon the drawer; and, therefore, this is a very natural proviso, that this should not extend to discharge any remedy that they might have for the principal sum, though there were no such protest.” Per Lord Hardwicke, C. J. in *Lumley v. Palmer*, *Ca. Temp. Hardw.* 78.

(40) A foreign bill of exchange was drawn payable at 120 days

Milford v. Mayor, Doug. 55. where the defendant was holden to bail, on an affidavit of debt, on a bill of exchange, drawn by defendant and indorsed to plaintiff, although the bill was not due at the time of the arrest; yet the drawee having dishonoured the bill, the court refused to discharge the defendant (41). And in *Ballingalls and another v. Gloster*, B. R. E. 43 G. 3. 3 East's R. 481. it was adjudged, that the indorsee of a foreign bill of exchange might bring an action against the person who had indorsed it to him, immediately on the non-acceptance of the drawee, although the time for which the bill was drawn was not elapsed, on the ground, that every indorser was in the nature of a new drawer. And Lord Ellenborough, C. J. said, that, in a late case tried before him at Guildhall, it appeared to be the universally received law on the Continent, that an indorser was liable immediately on the non-acceptance of the drawee.

V. Of the Transfer of Bills of Exchange.—Of the Party in whom the Right of Transfer is vested.

BILLS payable to order (42) or to bearer, are negotiable,

after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered to call evidence to prove, that the custom of merchants was such. But Lord Mansfield, C. J. said, the law was clearly otherwise, and refused to hear the evidence. *Bright v. Purrier*, London Sittings after Trin. 5 Geo. 3. Bull. N. P. 269. cited by Ellenborough, C. J. in *Ballingalls v. Gloster*, 3 East's R. 483.

(41) In *Macarty v. Barrow*, B. R. E. 6 Geo. 2. Str. 949. (more fully and accurately reported from a note supplied by Wilmot, C. J. in 3 Wils. 17. and from Ford's note, in 7 East, 437. n. (a) and recognized in *Francis v. Rucker*, Ambl. 672.) the defendant having drawn bills on Spain, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being arrested, he was discharged, upon motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn.

(42) It must be observed, that the indorsement of a bill which has

and the transfer of them for a good and valuable consideration vests a right of action in the assignee. It is a rule of the common law, that choses in action are not assignable; but in the case of bills of exchange there is an exception to this rule; and in favour of commercial intercourse they are, by the custom of merchants, assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*. Whether a bill of exchange be negotiable or not, is a question of law^k.

In respect of bills payable to order, the custom has directed, that the assignment should be made by a writing on the bill, called an indorsement; and in respect of bills payable to bearer, that the assignment should be constituted by delivery only (43). A transfer of a bill of exchange by indorsement is an act similar in effect to making a new bill, the indorser being in the nature of a new drawer^l.

Indorsements are of two kinds, 1st. blank, 2d. in full.—An indorsement in blank, which is the most common, is made by the writing the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made (44).

^k Grant v. Vaughan, 3 Burr. 1523.
1596. 1598.

^l Per Holt, C. J. Skin. 411. Hard-

wicke, Chr. 1 Atk. 282. Lord Mansfield, C. J. 2 Burr. 674. Lord Ellenborough, C. J. 3 East's R. 482.

not the words "or to his order" is good, or of the same effect between indorser and indorsee to make the indorser chargeable to the indorsee. Per Holt, C. J. Hill v. Lewis, Salk. 133.

(43) If a bill be payable to A. or bearer, and A. delivers it over for money received without indorsement, this is a sale of the bill, and the seller does not become a new security; but if he had indorsed it, he had become a new security, and then he had been liable upon the new indorsement. Per Holt, C. J. Governor and Company of the Bank of England v. Newman, Lord Raymond, 442. Cited in Emly v. Lye, 15 East, 7. and post. tit. Partner.

(44) Indorsements, either blank or special, subsequent to a blank indorsement by the payee, may be struck out even at the trial*; consequently a remote indorsee may declare as the immediate indorsee of the payee or first indorser.

Indorsees of a bill of exchange against acceptor. The bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson a bankrupt, (whose assignees had indemnified defendant) under a special indorsement to him or order. Jackson,

If A. the payee of a bill of exchange indorses it in blank^m and delivers it to B., and B. writes, above A.'s indorsement, "*pay the contents to C.*" without subscribing his own name, B. is not liable to C. as an indorser of the bill; for, in order to make a party liable as an indorser, his name must appear written with intent to indorse.

An indorsement in full, or special indorsement, mentions the name of the indorsee, as thus, "Pay the contents to A. B." and is subscribed with the name of the indorser (45).

m Vincent v. Horlock, 1 Camp. N. P. C. 442.

without indorsing the bill, sent it to Muir and Atkinson, who discounted it with plaintiffs. Plaintiffs had struck out all the indorsements except the first. Per Lord Kenyon, C. J. "The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs." *Smith and others v. Clarke*, *Sittings for London after T. 34 Geo. 3.* Peake's N. P. C. 225. 1 Esp. N. P. C. 180. S. C. So where there were several blank indorsements intermediate between the indorsement by the payee and the indorsement by the defendant, and plaintiff declared that the payee indorsed the bill to the defendant, who indorsed it to plaintiff; this was holden good. *Chaters v. Bell*, 4 Esp. N. P. C. 210. Per Lord Ellenborough, C. J.

(45) A full or special indorsement contains in itself a transfer of the interest in the bill to the person named in such indorsement. *Poth. Traité du Contrat de Change*, part 1. chap. 2. s. 23, 24. But a bare indorsement, without other words purporting an assignment, does not work an alteration of the property. Per Cur. *Lucas v. Haynes*, *Salk.* 130.

Clark having a bill of exchange payable to him or order, put his name upon it, leaving a vacant space above, and sent it to J. S. his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor. And it was objected, that the action should have been brought by J. S. But per Holt, C. J., J. S. had it in his power to act either as servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as indorsee. The property of the bill would have been transferred to him, and he only could have maintained this action against the acceptor; but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof a receipt for the money might be written over his name, and therefore the action is maintainable by Clark. *Clark v. Pigot*, *Salk.* 126. and 12 Mod. 192.

From the foregoing case it appears that a blank indorsement is an

It is not necessary that in an indorsement of this kind the words "or order" should be subjoined to the name of the indorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of the words "or order" in the indorsement, as will appear from the following cases:

Upon a case made at *nisi prius*, coram Pratt, C. J. it appeared, that the plaintiff had declared on an indorsement made by A., whereby he appointed the payment to be to B., *or order*, and upon producing the bill in evidence, it appeared to be payable to A., or order, but the indorsement was in these words, "Pay the contents to B." and therefore it was objected, that the indorsement, not being to order, did not agree with the plaintiff's declaration; but, upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the indorsement; and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser (46).

So where a foreign bill of exchange was drawn by A. on B., payable to C. or order, and accepted by B., and C. in-

n *Acheson v. Fountain*, Str. 557.

o *Edie v. E. I. Company*, 2 Burr. 1216.
and 1 Bl. R. 295.

equivocal act, and that it is in the power of the party to whom the bill is delivered to make what use he pleases of such an indorsement. He may either use it as an acquittance to discharge the bill, or as an assignment to charge the indorser.

Promissory notes and bills of exchange are frequently indorsed in this manner, "pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest. Per Lord Hardwicke, Ch. in *Snee v. Prescott*, 1 Atk. 249.

"A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement the holder may stop the negotiability." Per Lord Mansfield, C. J. *Ancher v. Bank of England*, Doug. 639.

(46) Before this decision in the case of *Acheson v. Fountain*, the same doctrine had been laid down with respect to a promissory note, in the case of *More v. Manning*, C. B. M. 5 Geo. 1. Comyn's R. 311, viz. that where a note is drawn payable to order, and the payee indorses it to A. (omitting the words "or order,") A. has (notwithstanding such omission) all the interest in the note, and may indorse it to B., who upon such indorsement may maintain an action against the maker.

dorsed it to D. without adding the words "or order," and D. afterwards indorsed it to E. who brought an action against B., the acceptor, for non-payment; evidence having been adduced at the trial of the usage of merchants with respect to indorsements of bills payable to order, where the words "or order" were omitted in the indorsement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others, that it restrained the negotiability of the bill, and made it payable to the indorsee only; the jury found a verdict for the defendant.—On a motion for a new trial, on the ground that evidence of the usage ought not to have been allowed; that the custom of merchants was part of the law of England, and that the law of England was fully settled on this point: the court were unanimous that a new trial ought to be granted; and *Ld. Mansfield, C. J.* said, he was clear that the evidence ought not to have been admitted, for the law was fully settled in the cases of *More v. Manning*, and *Acheson v. Mountain*, ante. The other judges concurred, and *Denison, J.* said, that there was not any instance of a restrictive limitation, where a bill was originally made payable to A. or order; that he had never heard of an indorsement to A. only, and that in general *the indorsement followed the nature of the thing indorsed.*

As a bill of exchange, payable to A.'s order, is, by the custom of merchants, payable to A., if he does not make any order; so by an indorsement of a bill of exchange to the order of A., A. is entitled to payment, if he makes no order.

A bill of exchange was drawn^p, payable to I. S., who indorsed it in this manner: "Pay the contents of the bill unto the order of Mr. Fisher." Fisher brought an action as indorsee, averring he had made no order to receive the money. The defendant demurred to the declaration, supposing that Fisher could not maintain the action, because the indorsement was not to him, *but to his order; sed per curiam*: The action is well brought against the indorser; for among tradesmen this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

A bill payable to the order of A. is payable to A., if he does not order it to be paid to any other person; and where no such order appears, it will be presumed that none was made.

p *Fisher v. Pomfret*, *Carth.* 403.

q *Smith v. McClure*, 5 *East*, 476.

Defendant had given a bill under his hand to pay to E. G. or order, a sum of money', and E. G. by indorsement ordered part of the money to be paid to plaintiff, upon which an action was brought; and a special custom among merchants was laid in the declaration according to the plaintiff's case: upon demurrer to an insufficient plea, which defendant had pleaded, it was adjudged a void custom, and that the declaration was ill; for where a man's contract hath subjected him only to one action, it cannot be divided so as to subject him to two or more. It was admitted, however, that if the plaintiff had acknowledged the receipt of the residue, the declaration would have been good.

In order to derive a legal title to a bill of exchange payable to order, it is necessary for the indorsee, in an action against the acceptor, to prove the hand-writing of the payee or first indorser^r; and therefore, though the bill may come into the hands of another person of the same name with the payee, yet his indorsement will not confer a title, though the payee be not particularly described in the bill^t; such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is a forgery, through the medium of which a title cannot be derived.

With respect to bills payable to bearer, or bills payable to order, but indorsed in blank, both which pass by delivery; if an assignee takes them, without any knowledge (47) of defect of title, *bona fide*, and for a valuable consideration, such assignee is entitled to payment (48).

^r *Hawkins v. Cardy*, Salk. 63. Carth. ^t *Mead v. Young*, 4 T. R. 28. per three justices, Kenyon, C. J. diss.
466. Ld. Raym. 360. S. C.
^a *Smith v. Chester*, 1 T. R. 654.

(47) See *Good v. Coe*, cited in argument, in *Boehm v. Sterling*, 7 Term R. 427. where the plaintiff had taken the note, on which he sued, for a valuable consideration, three months after it was due; and it appearing that the note had been lost by the true owners, and that the person from whom the plaintiff received it *had notice of this*, Lord Kenyon held, that the plaintiff was not entitled to recover. *

(48) This proposition, as far as it affects bills payable after sight, or after date, and not on demand, must be understood with this restriction, viz. that the party seeking to recover on such bills has not taken them after they became due; for in that case he is subject to all the equity to which the party from whom he took them was liable. See ante, note 47.

The following case, decided on a promissory note, will illustrate this position :

Trover for a bank note for 21*l.* 10*s.* payable to A., or bearer, on demand^a. A. being possessed of the note, sent it by the general post, under cover, to B. in Oxfordshire. The mail was robbed, and the note stolen. The note in question afterwards came into the hands of plaintiff for a valuable consideration, in the course of his business, and without notice that it had been stolen. The plaintiff having delivered the note to defendant, who was a clerk in the bank, for payment, he refused either to pay the money or re-deliver the note, whereupon this action was brought. On a case reserved, the court were of opinion, that plaintiff had sufficient property in the note to maintain this action; that a contrary determination would be attended with injurious consequences to commerce, since bank notes are constantly treated and considered as money, and paid and received as cash, and it was necessary that their currency should be established and secured. So where a bill of exchange^x with a blank indorsement had been lost by the holder, and afterwards was discounted by the plaintiffs (who were bankers) in the usual course of their business, without notice, for a person unknown to them, the plaintiffs were permitted to recover against the acceptor, upon proving the consideration which they had paid for the bill, which Kenyon, C. J. thought necessary. N., the holder had advertised the bill, but it did not appear that plaintiffs had ever seen the advertisement.

Defendant^y, on the 22d October, 1763, gave Bicknell, who was husband of a ship belonging to defendant, a cash note, or check on his banker, which was worded thus : " Pay to ship Fortune or bearer, 70*l.*" B. lost the cash note, which, having been offered to plaintiff, a grocer at Portsmouth, on the 25th October, 1763, in the course of business, he took it, *bonâ fide*, and gave a valuable consideration for it without notice of the loss. Defendant having directed his banker not to pay the cash note, an action was brought; and plaintiff declared, first, as on an inland bill of exchange, and, secondly, for money had and received. Verdict for defendant. A motion was made for a new trial, which, after argument, was granted; the court observing, that notes of this kind were negotiable by delivery, and as plaintiff came fairly by the note in question, for a valuable consideration, he was entitled to recover. And per Yates, J. " It has been doubted,

^a Miller v. Race, 1 Burr. 459

^x Lawson v. Weston, 4 Esp. N. P. C.

^y Grant v. Vaughan, 3 Burr. 1516.

1 Bl. R. 485 S. C.

whether that species of action, where the plaintiff declares upon the note itself, as upon a specialty, was proper, but here is a count for money had and received. The question, whether plaintiff can maintain this action, depends upon the note's being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and therefore *he* was certainly entitled to bring this action; and if he transfers his property to another person, that other person may also maintain the like action. Bicknell must, under the circumstances of the case, be considered as having delivered this instrument to plaintiff, which is tantamount to indorsement; and there is not any doubt of his having come by it fairly, *bonâ fide*, and for a valuable consideration."

In an action by the indorsee against the drawer of a bill of exchange^a, if it appears that the defendant drew the bill without consideration, and under duress, or that he was defrauded of it^b, or that the bill has been lost; it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it became due; but the defendant will not be permitted to object to the want of such proof, unless he has given plaintiff previous reasonable notice, to come prepared with such proof^c.

Case on a bill of exchange, payable to I. S. or bearer, against the drawer^d. Upon evidence ruled by Lord Pemberton, that plaintiff must entitle himself to it on a valuable consideration (though among bankers they never make indorsements in such case), for if he come to be bearer by casualty, or knavery, he shall not have the benefit of it. A bank bill payable to A. or bearer, being given to A. and lost^e, was found by a stranger, who transferred it to C. for a valuable consideration. C. got a new bill in his own name. Per Holt, C. J.—"A. may have trover against the stranger, who found the bill, for he had not any title, though payment to him would have indemnified the bank; but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the bearer."

A bill of exchange, payable to order, with a blank indorsement, stands on the same footing as a bill payable to bearer, both passing by delivery. On this principle, and the authority of the preceding cases of *Miller v. Race*, and *Grant*

^a *Duncan v. Scott*, 1 Camp. N. P. C. 100.

^b *Rees v. M. of Headfort*, 2 Camp. N. P. C. 574.

^c *Paterson v. Hardacre*, 4 Taunt. 114.

^d *Hinton v. ———*, 2 Show. 235.

^e *Anon. B. R. London Sittings*, M. 10 W. 3. Salk. 126. Ld. Raym. 739. S. C.

v. Vaughan, it has been holden^a, that a bill with a blank indorsement having been stolen and negotiated, the innocent indorsee thereof, for a valuable consideration, without notice, might recover against the drawer.

Of the Party in whom the Right of Transfer is vested.—Defendant drew a bill of exchange upon A.ⁱ payable at so many days sight to B. or order, for the use of C.; B. indorsed this bill to plaintiff, for value received: the bill was accepted, but payment having been refused, plaintiff brought this action as indorsee, against defendant as drawer. Defendant, after oyer of the bill, pleaded that C. (the *cestui que use*) was an officer in the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king, the sum mentioned in the bill was extended in his hands: upon demurrer, it was adjudged by the court for the plaintiff^h; first, because C. had an equitable and not a legal interest to have the money, for he could not maintain an action against the acceptor. Secondly, the indorsement was for value received of plaintiff by B., and so B. received the money to which C., as *cestui que use*, had an equity; but the sum demanded by plaintiff is not that sum, but another due to him for value received, in which sum C. was not concerned, for which reason the money now in demand was not extendible. This judgment was affirmed on error in the exchequer chamber. E. 2 W. & M. See 2 Vent. 307.

It is the constant usage of merchants for administrators to indorse and assign over bills of exchange^h, made payable to their intestate's order.

Where a bill of exchange has been indorsed by the payee to A. and B. as executorsⁱ, they may declare as such in an action against the acceptor.

When a bill of exchange is drawn, payable to A. and B. or their order^k, and A. and B. are not partners; to make it negotiable, the bill should be indorsed by A. and B., such being the usage of merchants (49); but in such case if the

^a Peacock v. Rhodes, Doug. 612.

ⁱ Evans v. Cramlington, B. R. T.

^h Jac. 2. Carth. 5.

^g E. 1 Will. & Mar. Holt, C.

^h Per Denison, J. 3 Wils. 4

ⁱ King v. Thom, 1 T. R. 487.

^k Carvick v. Vickery, Doug. 623 n.

(49) As the property in a bill of exchange passes to the holder, when he pays the consideration, and as indorsement is merely evidence of the transfer, a trader, who before his bankruptcy has parted with a bill for a valuable consideration, but omitted to indorse it,

bill be indorsed by A. in the name of himself and B., and afterwards the drawee accepts the bill so indorsed¹, it is not competent to him to object, that the bill has not been regularly indorsed. See *Porthouse v. Parker*, post. tit. Partners, S. IV.

*VI. Of Presentment for Payment, and herein of the Days of Grace—Non-payment and Notice thereof—Protest.**

WHERE bills of exchange are drawn payable at usance (50), or a certain time after date, or after sight, such bills ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what are termed days of grace (51).

“ In case of foreign bills of exchange the custom is^a, that three days (52) are allowed for payment of them, and if they

¹ *Jones v. Radford*, 1 Camp. N. P. C. 81. n.
as Per merchants, in evidence at Guild-

hall, Trin. 7 Wil 3 coram Holt, C. J.
Taswell v. Lewis, Ld. Raym. 743.

may indorse it after his bankruptcy; and such indorsement will be a sufficient title to the party to whom it was delivered. *Smith v. Pickering*, Peake's N. P. C. 50.

(50) This term signifies the time, which, by the usage of the countries between which the bills are drawn, is appointed for the payment of them. Poth. s. 15. See a table of usances, Chitty, 142, 143. Usances are calculated exclusively of the date of the bill, Chitty, 143.

The computation of time, when expressed by months, is by calendar months, Chitty, 143. Where bills are payable so many days after sight, the days are computed from the day the bills are accepted or protested for non-acceptance.

(51) In an action against the drawer of a bill of exchange, the evidence being that the bill had been demanded from the acceptor on the day preceding the last day of grace; the plaintiff was nonsuited, *Wiffen v. Roberts*, B. R. Middlesex Sitings, Kenyon, C. J. II. 35 Geo. 3. 1 Esp. N. P. C. 262.

(52) Three days, exclusively of the day on which the bill becomes due, every where, except at ~~Hamburg~~ Hamburg, where that day makes one of the days of grace, Chitty, 140.

are not paid on the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest it the last of the three days, which are called days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. But if it happens that the last of the said three days is a Sunday, or a great holiday, as Christmas-day, &c. upon which no money used to be paid, there the party ought to demand the money on the second day; otherwise it will be at his own peril, for the drawer will not be chargeable." Good Friday is to be considered as a Sunday or Christmas-day*.

The foregoing passage from Lord Raymond's Reports, mentions only foreign bills of exchange; but it was said by Lord Kenyon, C. J. in *Brown v. Harraden*, 4 T. R. 152. that it had been settled for more than half a century, that inland bills of exchange were payable at the same time as foreign bills of exchange.

I am not aware that it has ever been solemnly decided, that days of grace are allowable on bills of exchange payable at sight. If the reader wishes to pursue the dicta on this subject, he will find them collected in Mr. Chitty's Treatise on Bills of Exchange, &c. p. 114, 145, 146. The weight of authority is in favour of such an allowance (53).

No debt arises upon a bill payable after sight, until a presentment for payment; and consequently the statute of limitations will not operate as a bar to such bill, unless it has been presented for payment six years before the action commenced*. A different rule holds with respect to promissory notes payable on demand; for there the statute runs from the date of the note, and not from the time of the demand†.

The acceptor of a bill of exchange‡, having, or being presumed to have in his hands effects of the drawer, for the purpose of discharging the bill, is considered as the principal debtor, and is primarily liable; payment must, therefore, be demanded of the acceptor in the first instance, on the day when the bill becomes due; and, in case of refusal or default,

n Stat. 39 and 40 G. 3, c. 49.

o *Holmes v. Kerrison*, 2 Taunt. 323.

p *Christie v. Fossick*, C. B. London

Sittings after M. T. 52 G. 3. Sir J.

Mansfield, C. J. M. S.

q *Daglish v. Weatherby*, 2 Bl. R. 747.

(53) Days of grace are not allowed on bills payable on demand. Chitty, 146.

due notice of such demand and refusal or default must be given to the drawer, within a reasonable time after such demand and refusal or default, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to for non-payment of the bill.—The want of notice to a drawer who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. The notice of dishonour may be given on the same day on which payment is refused^r.

In an action by the indorsee of a bill of exchange against the drawer^s, it appeared that the bill had been drawn on the 1st of March, 1806, by the defendant, on one Moses Agar, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down and Co. On the 4th of June, when the bill became due, a clerk of Down and Co. presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who by letter, put into the two-penny post on the 6th, gave notice to the defendant of the dishonour; the plaintiff living in London, and the defendant at Shadwell. The case was left to the jury on the question, whether the notice of the dishonour had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion for a new trial, on the ground that due diligence had not been used, the court refused the rule:—*Le Blanc, J.* observing, that it could not be contended that a banker ought to give notice of the dishonour to any but his customer^t, for whom he held the bill; and he thought that the holder of a bill might avail himself of the conveyance by the two-penny post.

The distance at which the parties live from one another is immaterial, provided they are within the limits of the two-penny post; and it is sufficient if the letter be put into the receiving house in time for the party to have it on the day when he ought to have notice of dishonour^u.

Notice to the drawers of non-payment, by sending to their counting house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting house being locked, is sufficient,

^r *Burbridge v. Mauvers*, 3 Camp. N. P. C. 193.

^s *Scott v. Lifford*, 9 East, 347. 1 Camp. N. P. C. 246. S. C. See also *Langdale v. Trimmer*, 15 East, 291

^t See *Robson v. Bennett*, 2 Taunt. 299.

^u *Hilton v. Fauclough*, 2 Camp. N. P. C. 683.

without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place*.

Where there are several indorsements, and the holder gives notice of dishonour to his indorser, neither that indorser, nor any prior indorser, is bound to transmit the notice of dishonour on the very day on which he receives it. Each successive indorser will be considered as having used due diligence, if he transmit the notice of dishonour on the day after it is received, in a case where all the parties live in the same place; but if he neglect giving the notice on that day, and the day after, it will be too late. In *Smith v. Mullett*, 2 Camp. N. P. C. 209. Lord Ellenborough said, that it was of great importance that there should be an established rule upon this subject, and he thought there could be none more convenient than that where the parties reside in London, each party should have a day to give notice. In that case the plaintiff had notice of dishonour on the Monday, and did not give notice to his indorser until the Wednesday; Lord Ellenborough ruled, that as a day had been lost, the notice was not given in due time.—In *Jameson v. Swinton*, 2 Camp. N. P. C. 373. the same rule was recognized by Lawrence, J. viz. that each party to the bill has a day to give notice, with this addition, that a subsequent indorser may avail himself of a notice given by a prior indorser to the drawer; and that a notice given between eight and nine o'clock in the evening to a party living at Islington, is given in due time. See 2 Taunt. 224. S. C.

The law merchant, however, respects the religion of different people; and consequently a person is not required to give notice of the dishonour of a bill on a day, when, by the rules of his religion, it is unlawful to attend to secular affairs; e. g. a great Jewish festival†.

If the drawee of a bill goes abroad, leaving an agent here in England with power to accept bills, by virtue of which power the agent accepts the bill in question, it is incumbent on the holder to present such bill to the agent for payment, if the drawee continues absent‡.

Where a bill is made payable at a banker's in the city of London, it is sufficient to present the bill for payment to a clerk of the banker at the clearing house*. It is customary among the London bankers, in their dealings with each other, not to pay any check which is presented by, or on the behalf

* *Crosse v. Smith*, 1 M. and S. 545.

z *Philips v. Astling*, 9 Taunt. 206.

y *Lindo v. Unsworth*, 3 Camp. N. P. C. 602.

a *Reynolds v. Chettle*, 3 Camp. N. P. C. 596.

of another banker, after four o'clock in the afternoon; but merely to give an answer to the person so presenting it, whether it is a good check or not; and in case the check is approved, a mark is made on it, either by the person presenting it, or the person who gives the answer; and a check so marked is considered as entitled to a priority of payment on the next day. It is not necessary to present a check, so marked, for payment at the banking house on the next day; it is sufficient if it be presented at the clearing house^b.

A presentment at a banking house after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before duly presented within banking hours^c.

Where the holder of a bill of exchange intends to sue any of the indorsers, it is incumbent on him first to demand payment from the acceptor, on the day when the bill becomes due^d, and in case of refusal, to give due notice (54) thereof, within a reasonable time, to the indorser (55).

^b Robson v. Bennett, 3 Taunt. 389.
^c Elford v. Teed, 1 M. and S. 28.

^d Rushton v. Aspinall, Doug. 679.

(54) Notice of dishonour must be given within a reasonable time. The general rule, as it may be collected from *Tindal v. Brown*, 1 T. R. 167. seems to be with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it shall be sent by the next post. But if in any particular place the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent till the second post. In *Haynes v. Birks*, 3 Bos. & Pul. 599. where the bill, which was put by the plaintiff in the hands of his banker to present for payment, having been dishonoured in London about two o'clock on Saturday, and presented again at nine in the evening, by a notary, and notice given of the dishonour to the plaintiff on Monday at Knightsbridge, who gave notice to the indorser of it on Tuesday at noon, in Tottenham Court Road, it was holden that this notice was reasonable notice; Lord Alvanley, C. J. observing, that it did not appear, at what time on Monday the plaintiff received the notice from his banker; that he was not bound to be at home the whole of the day; and supposing him to have returned home late in that day, he was not bound to send a special messenger to the defendant; if he informed the defendant by the course of the post it was sufficient; and supposing him to have so done, the defendant would

Such demand, refusal, or default, and notice thereof, must be alleged in the declaration and proved. The reason on which this rule proceeds is this; the indorser is in the nature of a surety only, and his undertaking to pay the bill is not an absolute, but conditional undertaking; that is, in the event of a demand made on the acceptor, (who is primarily liable) *at the time when the bill becomes due*, and refusal on his part, or neglect to pay. It is not necessary to make any demand on the drawer*.

The notice of dishonour must proceed from the person who can give the drawer or indorser his immediate remedy on the bill.

In an action against the defendant as indorser of a bill^f, to prove notice of non-payment A. was called, who swore that he had been employed by the original parties to the bill to get it discounted; that when it became due, it was in the hands of one Abbott, to whom the plaintiff had indorsed it; that the day after, the witness met the defendant and told him it had not been paid; that the defendant asked who held it,

c Heylin v. Adamson, 2 Burr. 678.

f Stewart v. Kennett, 2 Camp. N. P. C. 177.

only receive his letter on Tuesday. The Chief Justice added, "There is not any law which requires notice to be given within any certain fixed time; it need not be given with all the dispatch which can possibly be used, but with all the dispatch that can reasonably be expected." Whether notice has been given within a reasonable time appears to be a mixed question of law and fact, or rather a question of law dependent on facts, viz. the situation and places of parties, post hours, and the like. See *Durbishire v. Parker*, 6 East's R. 3. where this question was agitated, and the cases on this point are collected.

(55) So before the indorsee of a promissory note payable to A. or order brings an action against the indorser, he must make a demand, or use due diligence to obtain payment from the maker of the note, per Lord Mansfield, C. J. in *Heylin v. Adamson*, 2 Burr. 676-7. who added, that this was determined in C. B. on great consideration in *Pauch*, 4 Geo. 2. cited by Lee, C. J. in *Collins v. Butler*, 2 Strange, 1087. But where the indorser has paid part of the money, that circumstance is sufficient to dispense with proving a demand on the maker of the note. Per Lee, C. J. *Midd. sittings*, B. R. Str. 1246. It is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends or otherwise. Admitted in *Russel v. Langstaffe*, Doug. 513. and in *Warrington v. Furber*, 8 East, 245.

and that the witness answered, it lies at Messrs. Bond's, Abbott's bankers. Lord Ellenborough, C. J.: "If you could make A. the agent of the holder of the bill, the notice would be sufficient: but, in reality he was a mere stranger. The bill, when dishonoured, lay at the bankers of Abbott, with whom A. had no sort of connection. But the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact. In this case A. was not possessed of the bill, and had no control over it. The defendant, therefore, is not proved to have had any legal notice of the dishonour of the bill, and is discharged from the liability he contracted, by indorsing it." Plaintiff non-suited.

Cases frequently occur, in which it is impracticable to make an actual demand; under these circumstances, due diligence to obtain payment from the acceptor is equivalent to a demand. In like manner where the residence of the indorser is unknown to the holder, if due diligence be used in discovering the place of residence, and notice is given as soon as that is discovered, it is sufficient.

As the rule requiring notice is introduced for the benefit of the party to whom such notice is given, of course it may be waived by that party. *Quilibet potest renunciare juri pro se introducto*. In some cases the rule is dispensed with, as where the drawer has not any effects in the hands of the acceptor; for then the drawer is presumed to have notice that the bill will not be paid; besides, not having any effects to withdraw from the hands of the acceptor, he cannot sustain any injury from the want of notice. But the circumstance of the indorser having effects in the hands of the acceptor, will not entitle the drawer to notice, if the drawer has not any effects in the hands of the acceptor. This was decided in the case of Walwyn v. St. Quintin, 1 Bos. and Pul. 652. which was an action of assumpsit on a bill of exchange drawn by defendant on one Dean, (by whom it was accepted) in favour of Thomas, by whom it was indorsed to plaintiff. The bill was drawn to accommodate Thomas, the indorser, who had placed securities on which he wished to raise money in the hands of the acceptor, but the drawer had not any effects in the hands of the acceptor. The bill, not having been paid when due, was protested; but notice of non-payment was not given to the drawer till four days afterwards. The plaintiff having threatened to sue the indorser and acceptor, the indorser paid part of the money due on the bill to plaintiff's attorney; afterwards on a representation being made to the

plaintiff of the probability of the acceptor being able to pay at a future period, plaintiff agreed not to press him. It was holden, that it was not necessary to give the drawer notice of the dishonour, the drawer not having any effects in the hands of the acceptor, although the indorser had.

From the circumstance of part payment of a bill without any objection to the want of notice^b, a jury may be directed to presume that notice was regularly given.

Protest.—In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest (56) it for non-payment; but where there has been a promise of payment, after bill became due, such promise supersedes the necessity of proving either presentment for paymentⁱ, notice of dishonour, or protest^k.

But where the drawer of a foreign bill of exchange at the time of the drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house, held that this was sufficient^l.

It appears from a passage extracted from the case of *Tassel v. Lewis*, Lord Raym. 743. ante, p. 338. that this protest ought to be made on the last day of grace (57). This strictness, however, is not observed in practice. The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month, and year, when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary having made his minute, draws up the protest at his leisure.

In Buller's *Nisi Prius*, p. 272. it is said, "That the use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made."

The practice certainly is as here stated; but in *Chaters v.*

^h *Horford v. Wilson*, 1 Taunton's R. 12.

^k *Gibbon v. Coggon*, 2 Camp. N. P. C. 186.

ⁱ *Greenway v. Hindley*, 4 Camp. 52.

^l *Robins v. Gibson*, 1 M. & S. 288.

(56) See the form of protest used in England. *Chitty on Bills*, p. 159.

(57) With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Per Buller, J. in *Leftly v. Mills*, 4 T. R. 174.

Bell, 4 Esp. N. P. C. 48. a question was raised, whether the protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended, that the mere noting the bill on that day, and drawing the protest on a subsequent day, was insufficient. Lord Kenyon was of opinion that it was sufficient; and a new trial having been granted, Lord Ellenborough agreed in opinion with Lord Kenyon. A case was then reserved for the opinion of the court, and after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again.

The protest must be stamped.

The protest for non-payment on inland bills of exchange is regulated by the statute 9 and 10 W: 3. c. 17.; for at common law a protest was not required on such bills; and the power of protesting given by this statute is attended with very few advantages; so that it is not very frequently exercised.

Having inserted this statute before, p. 325, as an introduction to the statute 3 and 4 Ann. c. 9. which gives the protest for non-acceptance on inland bills of a certain description, I must refer the reader to that part of the work.

It remains only to observe, that the holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it. It is sufficient, if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those only, against whom he seeks his remedy.— If a banker in London receives a check, by the general post one day, and presents it for payment the next day, he will be considered as having used due diligence^a.

VII. *Of the Acts of the Holder, whereby the Parties to the Bill may be discharged.*

If the holder enter into a composition with the acceptor, he thereby discharges the indorser^b.

^a *Ridgford v. Ridge*, 2 Camp. N. P. ^b *Ex-parte-Smith*, Co. B. L. 5th edit. p. 168, 169. 2 Bro. Ch. C. 1. S. C.

So if the indorser receive part payment from the acceptor^o, and take from him a security for the remainder, with the exception of a nominal sum, the indorser is discharged (58).

So where the holder, after receiving part payment from the acceptor^o, agreed to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; it was holden, that such agreement amounted to giving time and a new credit to the acceptor, and discharged the indorser, who was not a party to such agreement.

But a mere forbearance to sue the acceptor after protest for non-payment, and notice, or what is equivalent to notice, thereof to the drawer, will not discharge the drawer^o.

The cases *ex-parte Smith*, and *English v. Darley*, seem to have proceeded on a principle of law resulting from the relation, in which the acceptor of a bill of exchange may be considered as standing with respect to the other parties. Although by his acceptance he only undertakes to pay the debt of another, viz. of the drawer, yet is he primarily liable; for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only a collateral engagement, yet he may be considered as the principal debtor, and the remaining parties as sureties only. Now, in the case of simple contracts, if a creditor give time to the principal debtor (59), the collateral sureties are discharged both in law and equity^o, because the creditor cannot call on the other parties without an injury to the person to whom he has given time.

^o *English v. Darley*, 2 Bos. and Pul. 386. See the opinion of Eldon, C. J. ^r *Per Chambre, J.* 3 Bos. and Pul. 386. See also *Rees v. Harrington*, 2 Ves. Jun. 540, and *Nisbet v. Smith*, 2 Bro. Ch. C. 579.
^p *Gould v. Robson*, 3 East, 576.
^q 2d. Resolution in *Walwyn v. St. Quintin*. 1 Bos. and Pul. 652. fully stated, ante, p. 344.

(58) Receipt of part of the money from an acceptor will not discharge the drawer, if timely notice be given that a bill is not duly paid. Bull. N. P. 271.

The receipt of part of the sum mentioned in the bill from the drawer, will operate as a discharge to the acceptor, only *pro tanto*. *Bacon v. Searles*, 1 H. Bl. 88. Notwithstanding the receipt of part from the indorser, the holder may recover the whole amount of the bill from the drawer. *Johnson v. Kenyon*, 2 Wils. 262, *Walwyn v. St. Quintin*, 1 Bos. and Pul. 652.

(59) Without any reserve of the remedy against the sureties, per Lord Eldon, Ch. *ex-parte Gifford*, 6 Vesey, 807.

If the holder of a bill of exchange accepted for the accommodation of the drawer, takes a *cognovit* from the drawer for payment by instalments, he does not thereby discharge the acceptor; whether the holder, at the time of taking the bill, knew it was an accommodation bill or not.

The doctrine laid down in *ex-parte Smith*, and *English v. Darley*, must be confined to those cases in which the agreement between the holder and acceptor is made without the consent of the other parties to the bill, for otherwise they will not be discharged. This appears from the case of *Clark and others, executors of Males v. Devlin*, C. B. E. 43 Geo. 3. 3 Bos. and Pul. 363. in which it was adjudged, that the drawer of a bill, who had assented to the holder's taking a security from the acceptor, was, notwithstanding such security, liable to an action at the suit of the holder.

The holder of a bill, on its becoming due, allowed the acceptor to renew it without consulting the indorser: but the indorser afterwards meeting the acceptor, told him that it was the *best thing that could be done*; it was holden, that this was not a recognition of the terms granted by the holder to the acceptor, and that the indorser was discharged.

The holder may sue a *prior indorser*, although he has taken in execution a subsequent indorser, and afterwards let him go at large on a letter of licence, without having paid the debt. In a case where an action was brought by several partners, as indorseees of a promissory note against the defendant as indorser, and it appeared in evidence, that one of the partners had discharged a *prior indorser*, by a deed of composition; it was holden, that such deed operated as a release to the defendant² (60). But where the indorsee of a

s *Fentum v. Porock*, 5 Taunt. 192.
overruling *Laxton v. Peat*, 2 Camp.
N. P. C. 185. See also *Raggett v.*
Axmore, 4 Taunt. 730.

t *Withall v. Masterman and Co.*,
2 Camp. N. P. C. 179.
u *Hayling v. Mulhall*, 2 Bl. R. 1235.
x *Ellison & others v. Dezell*, Bristol,
Sum. Ass. 1811. M. S.

(60) "If a holder enter into an agreement with a *prior indorser* in the morning, not to sue him for a certain period of time, and then oblige a *subsequent indorser* in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *ex p. Smith*, Lord Thurlow, after consulting with all the judges, was of opinion, that the holder of a bill by entering into a composition with the acceptor, discharged the indorser, and accordingly ordered the proof against the estate of the latter to be

note made by the defendant for the accommodation of the payee and indorser covenanted not to sue the payee and indorser, it was holden, that the defendant could not avail himself of this covenant, in an action brought against him by the indorsee, although the defendant, by the verdict against him in this action, would have a right to recover over against the payee and indorser.

The holder sued the acceptor, and charged him in execution²; the latter obtained his discharge under the Lords' Act; the holder then sued the drawer, and recovered the amount of the bill; whereupon the drawer sued the acceptor, and charged him in execution; this was holden regular, for although the discharge of the acceptor, under the Lord's Act, was a satisfaction of the debt as to the holder, yet it would not operate as such between the drawer and acceptor.

VIII. *Of the Action on a Bill of Exchange—Evidence—Recovery of Interest.*

A BILL of exchange being a simple contract, the form of action, which is adopted for the recovery of the sum of money mentioned in the bill in case of non-acceptance or non-payment, is a special assumpsit; and, consequently, the rule laid down in the third section of the chapter on assumpsit, ante p. 100, applies here, viz. that the declaration must state the contract, (which in this case is the bill,) truly and correctly, that is, either in the terms in which it was made, or according

y Mallet v. Thompson, 5 Esp. N. P.

C. 178.

z Macdonald v. Bovington, 4 T. R.

825. cited in English v. Darley, 2 Bos. and Pul. 61.

expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. We all remember the case where Mr. Richard Burke being surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the surety, because he must, by so doing, enforce a payment from the principal, contrary to the agreement." "Per Lord Eldon, C. J. in English v. Darley, 2 Bos. & Pul. 62.

to the legal effect and operation of those terms; for a variance in any material point between the contract alleged, and the contract proved, will be fatal. As where the declaration stated the bill to be drawn by John Crouch^a, and upon the production of the bill in evidence, it appeared to have been drawn by John Couch, it was holden, that the variance was fatal.

It will be sufficient, however, to state the instrument according to its legal effect and operation.

As where a bill of exchange was payable to a fictitious payee or order, and indorsed in the name of such fictitious payee by agreement between the drawer and acceptor, it was holden that an innocent indorsee, for a valuable consideration, might declare on such bill as payable to bearer, either against the drawer^b, or against the acceptor^c of the bill (61).

If it is alleged in the declaration, that the defendant on such a day drew a bill of exchange, a variance between the day laid in the declaration, (although not under a viz.) and the date of the bill will be immaterial^d; but if it be alleged that defendant, on such a day, made his bill of exchange, bearing date the same day and year aforesaid, then a variance between the days will be fatal^e.

In an action upon a bill of exchange^f, it is not necessary to set forth the custom; for *lex mercatoria est lex terra*, and although plaintiff sets it forth, and does not bring his case

^a Whitwell v. Bennett, 1 Bos. and P. 539. ^d Coxon v. Lyon, York Lent Ass. 1810. Thomson, B. 3 Camp N. P. C. 307. n.

^b Collis v. Finett, 1 H. Bl. 313.

^c Anon. per Ellenborough, C. J. 3

^e Gibson v. Minet, 1 H. Bl. 509 D P

Camp. N. P. C. 303.

3 Feb. 1791. diss. Thurlow, Ch. ^f Mogadara v. Holt, 1 Show. 317

Eyre, C. J. and Heath, J.

(61) Where the indorsement by the payee is in blank, and there is a mesne indorsement between that indorsement and the indorsement to the holder, the holder may strike out the mesne indorsement, and the indorsement to himself, and state himself in the declaration as indorsee of the payee, and this rule holds although the mesne indorsement be a special indorsement, *Sutcliffe v. Clarke*, Penke's N. P. C. 225. and 1 Esp. N. P. C. 180. So if a bill be drawn payable to A. who indorses it to B., by whom it is indorsed to C., who afterwards indorses it to the holder, the holder may state in his declaration that the bill was indorsed by A. to C., who indorsed it to the holder, leaving out the intermediate indorsement, to B. *Charters v. Bell*, 4 Esp. N. P. C. 210.

within it, yet if by the law of merchants he has right, the setting forth the custom shall be rejected as surplusage.

A bill of exchange "*payable to A. or order, value received,*" may be alleged to be a bill for value received *by the drawer*.^g

In an action by the payee of a bill of exchange against the acceptor, on a bill payable to the plaintiff or order, the declaration omitted to allege a delivery to the payee; it was holden on special demurrer, that the omission was immaterial, and that the allegation that the drawer made the bill was sufficient^h, for that included the delivery of the bill to the payee.

In a late caseⁱ, where an action was brought against the acceptor of a bill *payable to the plaintiff's own order*, and the declaration alleged a delivery of the bill to the defendant, which he afterwards accepted. On special demurrer, because it was not alleged that the defendant ever re-delivered the bill to the plaintiff, the court were of opinion that there was not any ground for the objection; for the acceptance of the bill vested a right in the drawer to sue upon it; and if, after acceptance, the acceptor improperly detained the bill in his hands, the drawer might nevertheless sue him on it, and give him notice to produce the bill, or on his default give parol evidence of it.

In an action brought on a bill payable to the plaintiff's own order, it is not necessary for the plaintiff to allege in the declaration, that he has not made any order for the payment of the bill, nor that he has made any order for the payment of it to himself; for a bill payable to a person's own order is payable to himself, if he does not order it to be paid to any other; and such order not appearing, it will be presumed that none was made.

In an action by the indorsee against the drawer for non-payment of a bill, it is not necessary to state in the declaration, that the bill was accepted; if stated, however, it must be proved, but such proof will be supplied by evidence of a promise to pay the plaintiff after the bill became due; because such promise is an admission of the acceptance.^k

If a bill of exchange is accepted, *payable at a particular place*, in an action against the acceptor, this addition to the acceptance does not require to be noticed in the declaration, in B. R.^l, being no part of the contract, but merely a memo-

g *Grant v. De Costa*, 9 M. & W. 381.

h *Churchill v. Gardner*, 7 T. R. 406.

i *Smith v. M'Clure*, 5 East's R. 476.

k *Jones v. Morgan*, 9 Camp. N. P. C.

474.

l The Court of C. B. have, however, decided it to be necessary. *Gummon v. Schmolli*, H. 34 Geo. 3. 5 Taunr. 344.

random, where payment may be demanded^m; neither is it any ground of demurrer if it be not alleged, that the bill was presented for payment at such placeⁿ. Proof of presentment for payment at the place mentioned is not necessary^o. But in *Thatcher v. Still*, Wiltshire Spring Ass. 1813. Wood, Baron, nonsuited the plaintiff for want of such proof. The court of B. R. afterwards set aside the nonsuit.

A conditional acceptance cannot be declared on as an absolute acceptance, after condition performed^p.

The form of a declaration on a bill of exchange varies according to the parties against whom the action is brought.

As the contract of the indorser to pay the bill is not absolute^q, but conditional, that is, in the event of a demand made on the acceptor *at the time of payment and his refusal*, it is incumbent on the holder to state in his declaration against the indorser, and to prove at the trial such demand and refusal, and that the indorser has had due notice thereof.

An action was brought by the payee against the drawer of an inland bill of exchange^r, drawn in Jamaica at a time when days of grace were not allowed in that island; and the declaration stated, that the bill was drawn on the 16th of December, 1800, payable four months after date, and that, after it had been accepted by the drawee, *the time limited for the payment of the bill* being expired, to wit, on the 20th day of April, 1801, at, &c. it was shewn to the acceptor for payment, who then and there refused to pay the same, of which default the defendant (the drawer) afterwards, to wit, on the *same day and year last aforesaid*, to wit, at, &c. had notice; on demurrer, the declaration was holden bad. In the preceding case it must be observed, that the payment was demanded, or at least stated in the declaration to have been demanded, after the proper time. In *Rushton v. Aspinall*, Doug. 679. on a bill payable three

^m *Lyon v. Sundius*, 1 Camp. N. P. C. 423.

ⁿ *Fenton v. Goundry*, B. R. E. T. 1811. 3 Camp. N. P. C. 656. and 13 East, 439; but in *Sanderson v. Bowes*, 14 East, 500. it was adjudged on demurrer, that in an action on a promissory note, whereby the defendant promised to pay a sum of money on demand at a particular place, it ought to be averred, that the note was presented for payment at that place. And in *Roche v. Campbell*, London Sittings after

Trin. T. 52 G. 3. 3 Camp. 247. where the note produced in evidence contained a promise to pay *at a particular place* (in the body of the note) but the declaration omitted the words scored under, *Ld. Ellenborough, C. J.* held the variance to be fatal.

^o 3 Camp. N. P. C. 657.

^p *Langton v. Corney*, 4 Camp. 176.

^q *Rushton v. Aspinall*, Doug. 679.

^r *Lindo v. Barges*, Privy Council, 29 June, 1805, per Grant, Master of the Rolls, MSS.

months after date, the payment was stated in the declaration to have been demanded before the proper time, viz. on the day when the bill was drawn, and it was considered as a nullity.

If the bill be indorsed by procuration from the payee, care should be taken how such indorsement is stated in the declaration; for in a case where it was stated in the declaration, that A. drew a bill payable to B., and that B. indorsed it, *his own hand-writing being thereunto subscribed*; but, when the bill was produced, it appeared to have been indorsed by J. S., *by procuration from B.*; the variance was holden to be fatal. But where the declaration stated that the payee indorsed the bill "*his own proper hand-writing being thereunto subscribed*," and it appeared that the indorsement was in the hand-writing of the payee's wife, but that the defendant, when acquainted with this circumstance, promised to pay the bill; Lord Ellenborough said, he thought it would be too narrow a construction of the words *own hand*, to require that the name should be written by the party himself, and he was inclined to think, it would be enough to show the name written by an authorized agent; but that, at any rate, the defendant could not be allowed to take the objection, after a promise to pay, made with a knowledge of all the facts.—In *Heys v. Heseltine* and another²; where it was averred that the defendants accepted the bill, and the acceptance was by an agent thus, "for Heseltine and Co. John Wilson;" Lord Ellenborough was of opinion, that the evidence supported the declaration; observing, that if the defendants accepted the bill by an agent, in contemplation of law, they accepted it themselves: and it was a general rule in pleading, that facts might be stated according to their legal effect.

In a case where the indorser's name had been put on the paper before the bill was drawn, and it was stated in the declaration that the indorsement was made *after* the drawing the bill, the variance was holden to be immaterial³. So where the indorsement was stated to have been made before the bill became due, and it appeared in evidence to have been made *after* the bill became due, this was holden not to be a material variance⁴.

When the action is brought between the immediate par-

² *Levy v. Wilson*, 5 Esp. N. P. C. 180. u 2 Camp. N. P. C. 604.

³ *Ellenborough, C. J.*

⁴ *Russell v. Langstaff*, Doug. 514.

⁵ *Helmaley v. Loader*, 4 Camp. N. P. C. 119. *Young v. Wright*, 1 Camp. N. P. C. C. 450.

ties to the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill has been given; for as the bill does not merge the original demand, if the plaintiff fail in substantiating in evidence the special count, he may resort to evidence on the common counts (62).

Proceedings subsequent to the Declaration.—The plaintiff having declared, the defendant, if he has not any defence, either compromises the action by paying or giving security for the debt and costs; or he lets judgment go by default.

If the holder commences one action against the drawer,

z *Smith v. Woodcock*, 4 T. R. 691. S. P. on a promissory note, *Windham v. Wither*, and *Windham v. Trull*, Str. 515.

(62) In *Alves v. Hodgson*, 7 T. R. 241. where the plaintiff had declared specially on a written contract made in Jamaica, and on a quantum meruit, and was prevented from establishing the special count, because the contract, by the laws of the island of Jamaica, was void for the want of a stamp; it was holden, that he might recover on the quantum meruit. So where a promissory note had been given for money lent, which when produced in court was unstamped. Lord Kenyon, C. J. permitted the plaintiff to recover on a common count for money lent, by proving that when the money, for which the note had been given, was demanded of the defendant, he acknowledged the debt. *Tyte v. Jones*, Midd. Sittings, 1788. 1 East's R. 58 N. (a.) *Wilson v. Kennedy*, 1 Esp. N. P. C. 245. S. P. In cases of this kind, if the defendant call for a particular of the plaintiff's demand, the causes of action in the general counts ought to be stated in the particular, otherwise the plaintiff will not be permitted to go into evidence on them. *Wade v. Beasley*, 4 Esp. N. P. C. 7. Kenyon, C. J. If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant will undertake to swear that he has been misled by the inaccuracy. *Day v. Bower*, Sittings after H. T. 1806. *Elleborough*, C. J. 1 Campb. N. P. C. 69 n. And although the general rule is, that the plaintiff, who has delivered an imperfect particular, shall be restricted in his evidence, and not permitted to recover any thing ultra the contents of such particular, yet if the defendant, in attempting to defeat the restricted claim of the plaintiff, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him: what he could not have insisted on as a right he may receive as a boon. *Hurst v. Watkis*, M. T. 48 G. 3. B. R. *Ellenborough*, C. J. 1 Camp. N. P. C. 68. "Bills of particulars are not to be construed with all the strictness of declarations." Per Mansfield, C. J. in *Brown v. Hodgson*, 4 Taunt. 190.

and another against the indorser, the court will stay all the proceedings upon payment of the amount of the bill and the costs of the two actions; without regarding the costs which may have been incurred in actions brought by the holder against any other parties to the bill. But when the application for staying proceedings comes from the acceptor, who is the original defaulter, the court will not regard it, except upon payment of the amount of the bill and costs in *all* the actions^a.

When the defendant suffers judgment to go by default, the plaintiff must, before he is entitled to final judgment and execution, ascertain the amount of the debt. Formerly this was done by executing a writ of inquiry of damages; but of late years, in the courts of King's Bench^b and Common Pleas^c, in actions upon promissory notes and bills of exchange, where it appears on the face of the declaration, that the actions are brought on the notes or bills^d, and the money mentioned therein is not foreign money, it is usual to apply to the court for a rule to shew cause why it should not be referred to the master in B. R. and prothonotary in C. B., to see what is due for principal and interest, and why final judgment should not be signed thereon, without executing a writ of inquiry, which rule is made absolute on an affidavit of service, unless good cause be shewn to the contrary. In vacation time, application may be made to one of the judges of B. R. or C. B. at chambers. *N.* The rule ought not to be applied for on the day of signing interlocutory judgment, but some day after^e.

It is worthy of remark, that the Court of Exchequer still adheres to the ancient practice of executing a writ of inquiry of damages upon a judgment by default, in actions on bills of exchange and promissory notes.

Where the bill of exchange is for foreign money^f, *e. g.* for Irish money, the court will not permit the master to ascertain the value. In this case, therefore, the plaintiff must have recourse to a writ of inquiry; upon the execution of which it is now holden^g, notwithstanding former

- ^a Admitted per Curiam, in *Smith v. Woodcock*, 4 T. R. 691.
- ^b *Shepherd v. Charter*, case on a bill of exchange, B. R. June 4th, 1791. 4 T. R. 978.
- ^c *Rushleigh v. Salmon*, case on a promissory note, C. B. June 15th, 1789. 1 H. Bl. 252. *Andrews v. Blake*, case on a bill of exchange, C. B. Nov. 26, 1790. 1 H. Bl. 520.
- ^d *Gibson v. Doad*, 3 T. R. 649.
- ^e *Gordon v. Corbett*, B. R. H. 44 G. 3. *Smith's R.* 170.
- ^f *Mansell v. Lord Massereene*, 5 T. R. 87.
- ^g *Green v. Hearn*, 3 T. R. 301.

decisions to the contrary^b, that it is not in any case necessary to *prove* the bill of exchange, the bare production of it being sufficient; for by suffering judgment to go by default, the defendant admits the cause of action to the amount of the bill. The bill, however, must be produced to the jury, in order that they may see whether or not any part of it has been paid.

Evidence.

In an action by the indorsee of a bill against the acceptor^c, it is not necessary for the plaintiff to prove the hand-writing of the drawer, for when a bill is presented for acceptance, the acceptor is supposed to look at the hand-writing of the drawer, and on that account he is precluded from disputing it afterwards, and cannot give in evidence even a forgery of such hand-writing (63). But the hand-writing of the first indorser must be proved, because the acceptor is not supposed to look any farther than the hand-writing of the drawer^k.

Action by the indorsee against the indorser of a bill of exchange^l. The declaration stated several indorsements prior to that of the defendant, which was immediately to

h *Snowdon v. Thomas*, 3 Wils. 155. 2 Bl. R. 749. S. C.

i *Jenys v. Fowler*, Str. 946. coram Raymond, C. J. London Sittings. Per Buller, J. 1 T. R. 655. S. P. Per

* *Dampier, J. in Bass v. Clive*, 4 M. and S. 13. S. P.

k *Smith v. Chester*, 1 T. R. 654. Cooper v. Lando, B. R. London Sittings after M. T. 52 G. 3. S. P. as to hand-writing of 2nd indorser, being alleged in declaration.

l *Critchlow v. Parry*, B. R. 2 Camp. N. P. C. 192.

(63) A bill of exchange was shewn to the defendant, whose name appeared on the bill as acceptor, and he was asked whether it was his hand-writing; he said it was, and that the bill would be duly paid: Lord Ellenborough, C. J. held that this accredited the bill, and the plaintiff having been thereby induced to take it, the defendant could not set up as a defence that his name, as written on the bill, was a forgery, *Leach v. Buchanan*, 4 Esp. N. P. C. 226. A forged bill was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee, who had given a valuable consideration for the bill; on discovering the forgery, the plaintiff brought an action for money had and received, to recover back the money; it was holden, that the action would not lie; Lord Mansfield, C. J. observing, that it was incumbent on the plaintiff to have been satisfied as to the drawer's hand-writing before he accepted the bill. *Price v. Neal*, 3 Burr. 1354. 1 Bl. R. 390. S. C. cited 1 Marsh. R. 459. Where a bill of exchange purports to be drawn by a plurality of persons, and is so declared on, the acceptor of such bill will not be permitted to prove that the supposed firm consisted of one person only. *Bass v. Clive*, 4 Maule & Selwyn, 13.

the plaintiff. A question arose, whether upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers, and particularly that of the original payee. The plaintiff's counsel contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged he would be liable; that he was to be considered as the drawer of a new bill of exchange, and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom, therefore, a title through the payee must be established. Lord Ellenborough was of this opinion, and the plaintiff had a verdict.

Action for money^m paid by plaintiffs, Messrs. Forsters, Lubbock, and Co. bankers for defendant. A bill of exchange was drawn on defendant, by one Hanley, payable to his own order, which defendant accepted, "payable at Forsters, Lubbock, and Co. London," the plaintiffs; when this bill was presented at the plaintiffs' house, it was paid by them, and the action was brought to recover the sum so paid. Plaintiffs proved the acceptance, and the fact of payment, and contended they were intitled to recover without proving the indorsement of the drawer, which was upon the bill at the time it was paid by them, alleging that the bill, when presented, being *prima facie* in a negotiable state, they were authorized to pay it, and were not bound to inquire into the title of the holder; but Lord Ellenborough ruled that it was necessary to prove the first indorsement.

In an action against the drawer of a billⁿ, it was holden, that payment of money into court, upon the whole declaration, was such an admission of the cause of action as superseded the necessity of proving the hand-writing of the drawer.

Where notice of the dishonour of a bill has been given by letter^o, a copy of the letter cannot be given in evidence to prove such notice, unless there has been notice given to produce the original.

In an action against the drawer of a foreign bill^p, the protest being part of the custom of merchants with respect to

^m Forster v. Clements, B. R. London
Sittings after H. T. 1809. 2 Camp.
N. P. C. 17.

ⁿ Gutteridge v. Smith, 2 H. Bl. 374.

^o Langdon v. Hulse, 5 Esp. N. P. C.
186.

^p Gale v. Walsh, 5 T. R. 299.

foreign bills, must be proved (64), if the bill has been drawn for actual value in the hands of the drawee; but not otherwise¹. A promise by the drawer², after the bill is due, that he will pay it, supersedes the necessity of producing the protest; for in such case it will be presumed from the party's not objecting to the want of a protest at the time when he made the promise, that he has received due notice of dishonour by a protest regularly drawn up by a notary. The presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill. A notarial protest under seal is not evidence of such presentment³.

In an action by the holder against the drawer⁴, the acceptor is a competent witness to prove that the drawer had not any effects in his hands, and thereby to relieve the holder from the necessity of proving notice of dishonour: for though by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he at the same time gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, for that fact must be proved by another witness.

In an action by the indorsee against the acceptor, the defendant may call the payee and indorser to prove that the bill was void in its creation, as being drawn in London without a stamp, though dated abroad⁵.

So in an action by an indorsee of an accommodation bill, payable to the drawer's own order, against the acceptor, it was holden, that the drawer who had indorsed the bill to the plaintiff might be a witness to prove that the bill was given by him to the plaintiff on an usurious consideration, the witness having been released by the acceptor⁶, or, without a release,

q. *Legge v Thorpe*, 19 East, 171. 2 Camp. N. P. C. 310. S. C.

r. *Gibbon v. Coggon*, 2 Camp. N. P. C. 198.

a. *Cheamery Noyes*, 4 Camp. 129 per Lord Ellenborough, C. J.

1 *Staples v. Okines*, 1 Esp. N. P. C. 332. *Peake's Evid.* 154, 5, per Kenyon, C. J. See also *Walfryn v. St Quintin*, 2 Esp. N. P. C. 518.

2 *Jordaine v. Lashbrook*, 7 T. R. 601.

3 *Rich v. Topping*, *Peake's N. P. C.* 224. 1 Esp. N. P. C. 177. S. C.

(64) If in a declaration on an inland bill of exchange, a protest and notice thereof be set forth, the plaintiff must prove them; inasmuch as protests on inland bills of exchange are material, entitling the holder to costs under stat. 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9. per Lord Kenyon, C. J. in *Boulager v. Talleyrand*, 2 Esp. N. P. C. 550.

to prove that there was usury in the discount of the bill by the witness⁷.

In an action by indorsee against drawer, the payee and indorser was holden^a to be a competent witness to prove that the defendant had acknowledged his liability, and promised to pay the bill.

In an action by the indorsee against the drawer of a bill of exchange, drawn without consideration, the payee who indorsed it to the plaintiff, in payment of goods, is a competent witness to prove the consideration for the indorsement^b. But in an action by the indorsee against the maker of a promissory note, without original consideration, if the payee has become bankrupt, and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendant^b.

A bill of exchange payable to the order of the drawer, may be given in evidence under the count for money had and received, in an action brought by the drawer and payee against the acceptor^c.

Recovery of Interest.—On bills of exchange payable at a day certain, and not carrying interest on the face of them, interest is recoverable from the day on which the bills become due (65).

y Brard v. Ackerman, 5 Esp. N. P. C. 119.

z Stevens v. Lynch, 2 Camp. N. P. C. 332.

a Shuttleworth v. Stephens, 1 Camp. N. P. C. 407.

b Maundrell v. Kennett, Lond. sittings in H. T. 1809. Cor. Bayley, J. ib. n.

c Thompson v. Morgan, 3 Camp. P. C. 161.

(65) The general rule at the present day, with respect to the allowance of interest, is much narrower than it was formerly. The modern doctrine is, that interest ought to be allowed in those cases only, where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred, that this was their intention; or where it can be proved, that interest has been actually made of the money^{*}. Hence upon a mere simple contract of money lent without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, whence a contract for interest may be inferred, interest is not allowable[†]. In a contract for the sale of

* Per Ld. Ellenborough, C.J. in *De Havilland v. Bowerbank*, 1 Camp. N. P. C. 51.

† *Calton v. Bragg*, 15 East, 923.

Bill was drawn at Barbadoes on the 8th February, 1809, on a house in London, payable to the plaintiff at sixty days sight; the bill was refused acceptance on the 17th April, 1809, and was afterwards presented for payment on the 19th June following. Lord Ellenborough left the question, from what period the interest was to be calculated, to the special jury, who said that the holder of the bill was entitled to £10 per cent. on the principal, as damages, and that interest was to be allowed only from the time when the bill was presented for payment^d; but in a subsequent case^e, when the holder did not claim any per centage upon the principal as damages, he was allowed interest from the time the bill was dishonoured for non-acceptance.

The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour^f.

Formerly interest was computed from the day on which the principal became due, to the time of commencing the action; but, according to *Robinson v. Bland*, 2 Burr. 1085, interest ought to be carried down to the day on which judgment is signed (66).

d *Gantt v. Mackenzie*, 3 Camp. N. P. C. 51. e *Harrison v. Dickson*, ib. 52. n.
f *Walker v. Barnes*, 5 Taunt. 240.

goods, although a particular time be limited for payment of the price, yet the vendor is not entitled to interest on the price from that time^g. But where the goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered. *Marshall v. Poole*, 13 East, 98. *Porter v. Pulsgrave*, 2 Camp. N. P. C. 472. And in such cases interest will be allowed, although the defendant has not accepted the goods, in an action for not accepting the goods. *Boyce v. Warburton*, 2 Camp. N. P. C. 480. Bankers cannot charge interest upon interest upon money advanced by them without an express contract for that purpose. *Daves v. Pinner*, 2 Camp. N. P. C. 486.

(66) It must be observed, that in *Blaney v. Hendrick*, C. B. E. 11 Geo. 3. 3 Wil. 205. 2 Bl. R. 761. S. C. where it was holden, that in assumpsit on an account stated between merchant and merchant, the jury on the execution of the writ of inquiry might give interest from the day the account was stated, the interest was carried down to the time of bringing the action according to *Wilson's Report*, and down to the time of the inquisition, according to *Blackstone's Report*.

^g *Gordon v. Swan*, B. R. E. T. 50 G. 3. 2 Camp. N. P. C. 459. 12 East, 410.

This period for the computation of interest was recognized by Buller, J. in *Frith v. Leroux*, 2 T. R. 58. where that learned judge said, that on debts carrying interest, the jury are now directed to give interest in damages up to the day on which judgment may be signed.

Upon promissory notes payable upon demand, interest is due only from the time of the demand; but upon promissory notes payable at a certain day, interest is due from that day, though there be no demand; because the person who is to pay, is in this case bound to find out the other, and pay it at the day ^g.

Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest from that day ^h.

Where the terms of a promissory note are, that it shall be payable by instalmentsⁱ, and on failure of payment of any instalment the whole is to become due, interest becomes payable from the time of the first default.

Under a particular of the plaintiff's demand^k, stating that the action was brought to recover the amount of a note, interest (although not claimed *eo nomine* in the particular,) is recoverable, as arising out of the principal demanded by the particular.

IX. Of the Nature of a promissory Note.—Stat. 3 and 4 Ann. c. 9. s. 1. placing promissory Notes on the footing of inland Bills of Exchange.—What are negotiable Notes within the Statute.—Of Banker's Notes.—Joint and several Notes.—Consideration.—Stamp.

A PROMISSORY note is a promise in writing to pay to A. or order, or to A. or bearer, a sum of money, either at sight, or at a certain time after sight, or after date, or on demand.

^g Per Cur. *Druckett v. Archer*, M. 1 *Blake v. Lawrence*, 4 Esp. N. P. C. 6 Geo. 1. 147 *Ellenborough, C. J.*
^h *Pinhorn v. Tuckington*, 3 Camp. N. k S C
P. C. 468.

It having been holden, in the case of *Clerk v. Martin*, Salk. 120, and in other cases, that the *payee*, and in *Buller v. Crips*, 6 Mod. 29. that the indorsee of a promissory note, payable to order, could not maintain an action against the maker thereof, such note not being within the custom of merchants; it was, for the purpose of encouraging trade and commerce, by permitting promissory notes to be negotiated in like manner as inland bills of exchange, enacted by stat. 3 & 4 Ann. c. 9. s. 1. "That all notes (67) in writing, made and signed (68) by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually entrusted by them to sign such notes for them, whereby such person, &c. or their servant or agent, promise to pay to any other person or persons, body politic and corporate, or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable: and also such note, payable to any person, &c. or order, shall be assignable or indorsible over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and the person, &c. to whom the money is payable, may maintain an action for the same in such manner as he might upon any inland bill of exchange, made according to the custom of merchants; and the person, &c. to whom such note is indorsed or assigned, may maintain an action, either against the person, &c. who or whose servant or agent signed such note, or against any of the persons who indorsed the same, as in cases of inland bills of exchange, and the

(67) It has not been determined, whether this statute extends to foreign notes. In *Pollard v. Herries*, 3 Bos. and Pul. 335, an action was brought on a promissory note made at Paris, and payable there or in London. The plaintiff recovered, and no objection was raised on the ground of its being a foreign note. In *Harriet v. Morris*, London Sittings after M. T. 53 G. 3. 3 Camp. N. P. C. 303, an action was brought on a promissory note made at Paris, and the plaintiff recovered. The place of date was not mentioned in the declaration: but Lord Ellenborough held the omission to be immaterial.

(68) Declaration that defendant made a note, *et manu sua propria scripsit*. It was objected, that since this statute, plaintiff should have averred that defendant signed the note; but the court held it to be well enough, because laid to be written with his own hand. *Taylor v. Dobbins*, 1 Str. 399. 7 Geo. —. S. P. on Remurrer. *Elliott v. Cooper*, Ld. Raym. 1376.

plaintiff, shall recover damages (69) and costs of suit; and in case of nonsuit or verdict against plaintiff, defendant shall recover costs."

The foregoing statute being a remedial law, and made for the encouragement of trade and commerce, the courts have construed it liberally.

Hence a note, promising to *account with J. S.* or order, has been construed as a promise to *pay J. S.* or order, and within the meaning of the statute¹.

So a promissory note, payable to B.^m (omitting the words "or order,") three months after date, was holden a good note within the statute, and it was adjudged, that it might be declared on as such by the payee.

So where the promise was by A.ⁿ to pay so much to B., for a debt due from C. to B., it was holden, that it was within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received.

So where the note was in this form*, "I do acknowledge that Sir A. C. has delivered to me all the bonds and notes, for which 400*l.* were paid to him on account of Col. S., and that Sir A. delivered me Major G.'s receipt, and bill on me for 10*l.*; which 10*l.* and 15*l.* 3*s.* balance due to Sir A. I am still indebted, and do promise to pay." On demurrer to the declaration, the note was adjudged good.

So where the note set forth in the declaration was^p, "I do acknowledge myself to be indebted to A. in £ , *to be paid* on demand for value received." On demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute, the words "*to be paid*"

1 *Monice v. Lea*, 8 Mod 362. 1 Str. 629. Ld Raym 1306, 7.

m *Smith v. Kendal*, 6 T. R. 123. S P. per Hardw. C J Cunningham Bills of Ex. 222. See also *Moor v. Palm*, 1 Ca. Temp. Hardw. 283 where Hard-

wicke, C J. said this point had been ruled often.

n *Popplewell v. Wilson*, B. R. Str 204. on error from C B.

o *Chadwick v. Allen*, Str 706

p *Casborne v. Dutton*, 3 Bacc M 1 Geo 2 MSS.

(69) From this word "damages," it has been inferred, that debt will not lie upon a promissory note, because damages are never recovered in debt. See 1 Mod. Entr. 312. pl. 14. but in *Bishop v. Young*, 2 Bos. & Pul. 78. it was holden, that debt might be maintained by the payee against the maker of a promissory note, expressing a consideration on the face of it, as where it was expressed to be for value received.

amounting to a promise to pay; observing that the same words in a lease would amount to a covenant to pay rent.

This statute, however, extends to such notes only as contain an *absolute* promise to pay money at all events^q, (and not a promise depending on a contingency,) and where the money at the time of the giving the note becomes due and payable by virtue thereof, (so are the words of the statute) and not where it becomes due and payable by virtue of a subsequent contingency, which may perhaps never happen, in which case the money would never become payable (70).

On this ground the following notes have been adjudged not to be negotiable notes within the statute, viz.

A promise by defendant to pay to plaintiff 26*l*.^r within a month after Michaelmas, if the defendant did not pay the 26*l*. for which the plaintiff stood engaged for his brother I. B.

A promise to pay A. B. *£* , value received^s, on the death of C. D. provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it.

A promise to pay money within so many days after the maker of the note should marry^t.

So where the promise was to pay A. F. *£* out of the maker's money that should arise from his reversion of *£* when sold; the declaration averred the sale of the reversion; yet it was holden, that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only on a contingency^u.

A similar decision was made in *Hill v. Halford*^x, 2 Bos. & Pul. 413. where the promise was to pay *£* , on the sale or produce, immediately when sold, of the 'White Hart, St. Alban's, Herts, and the goods therein, although it was averred in the declaration, that the house and goods were sold.

^q Willes, C. J. in delivering the opinion of the court, in *Coleman v. Cooke*, 11. 16 G. 2. C. B. Willes, 393.

^r *Appleby v. Biddle*, B. R. H. 3 G. 1. MS.

^s *Roberts v. Peake*, 1 Burr. 323.

^t *Beardesley v. Baldwin*, Str. 1151. 7 Mod. 417. oct. ed.

^u *Carlos v. Faucourt*, 5 T. R. 482.

^x *Hill v. Halford*, 2 Bos. and Pul. 413. (in the Exch. Ch.) on error from B. R.

(70) Before the statute of Ann, a promise to pay A. or his assigns a sum of money within a certain time after defendant should be lawfully married to E. S. was holden not to be a good note; because to pay money on such a contingency could not be called trading, and therefore not within the custom of merchants. *Pearson v. Garrett*, 4 Mod. 242.

In a case where the instrument acknowledged to have borrowed and received £ in drafts, payable to the defendants at a future day, which the defendants promise to pay with interest; it was holden that this was a special agreement, and not a promissory note; for the money was not to be paid at all, unless the drafts were honoured¹.

Upon an instrument in the common form of a joint and several promissory note, signed by A. B. and C., there was an indorsement (written, as appeared in proof, before B. and C. had signed the note) stating that the note was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case; an action having been brought by the payee against B., the first count stating the note as payable on request, and a second as payable six months after date; Lord Ellenborough, C. J. held, that, although the instrument possibly might have been considered as a promissory note in the hands of a *bona fide* holder, who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the indorsement must be incorporated with the body of the note; and consequently an action could not be maintained upon it without an agreement stamp².

An instrument purporting on the face of it to be a promissory note, payable absolutely for the price of goods, but having an indorsement upon it (written before the note was signed,) stating that it was given on condition that if any dispute arose about the sale of the goods, it should be void, is not a negotiable note³.

2. A promissory note must be for the payment of money only.

Hence on error from C. B. it was holden⁴, that a note to deliver *up horses and a wharf*, and pay money at a particular day, could not be declared on as a note within the statute.

And a similar determination was made⁵, where the promise was to pay 300*l.* to A. or order, in good *East India bonds*.

So where the promise was to pay J. S. so much money⁶, or

y *Williamson v. Bennet*, 2 Comp. N. P. C. 417. c *Moor v. Vanlute*, 1 G. 1. C. B. Bull. N. P. 272.
 z *Leeds v. Lancashire*, 2 Comp. N. P. C. 205. d *Smith v. Boheme*, (reported as to the argument) in Gilb. R. 93. cited in argument in Lord Raym. 1562 & 1596.
 a *Hartley v. Wilkinson*, B. R. E. 55 G. 3. 4 M. & S. 25.
 b *Martin v. Chantry*, Str. 1271.

to render the body of J. N. to prison before such a day, the note was holden bad; because the note was not necessarily and originally for the payment of money, but by matter *ex post facto* became a note for payment of money only, viz. the body not being surrendered to prison.

3. It must not be payable out of a particular fund, which may or may not be productive. Statement of the consideration, however, for which a note was made, will not vitiate it.

On this principle*, a promissory note to pay a sum of money three months after date, for value received, of the premises in Rosemary Lane, late in the possession of T. R. was holden a good note within the statute.

In the following cases the principle before laid down was recognized, but the notes were adjudged good.

A promissory note was given to an infant^f, payable when he should come of age, viz. on such a day in such a year; this was holden good; for, per Denison, J. here is no condition or uncertainty, but it is to be paid certainly and at all events, only the time of payment is postponed.

So where plaintiff declared in 1st count on a promissory note^g, dated 27th May, 1732, whereby defendant promised to pay to H. D. or order, 150 guineas, ten days after the death of his father John Cooke, for value received, which note, after the death of the father (which was laid to be the 2d April, 1741), was duly indorsed by D. to plaintiff; and in the 2d count, on a promissory note, dated 15th July, 1732, whereby defendant promised to pay H. D. or order, six weeks after the death of his father, 50 guineas, for value received, the like indorsement laid after the death of the father as before; after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 and 4 Ann. c. 9. After three arguments^h, Willes, C. J. delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency; that there was a certain promise to pay at the time of giving the notes, and the money by virtue thereof would become due and payable one time or other, though it was uncertain when that time would come; that there was not any weight in the objection that the maker might have died before his father, in which case the notes would have

^e *Burchell v. Stoeck*, Lord Raym. 1548, cited by Kenyon, C. J. 6 T. R. 194.

^f *Goss v. Nelson*, 1 Esp. 226.

^g *Coleman v. Cooke*, H. 16 G. 2. C. B. Willes, 293. Affirmed on error in B. R. M. 18 G. 2. Str. 1217.

^h See Str. 1217.

been of no value, because the same might be said of any note payable at a distant time, that the maker might die worth nothing before the note became payable. He added, that the court thought that the averment of the death of the father before the indorsement did not make any alteration; because they were of opinion, that if the notes were not within the statute *ab initio*, they could not be made so by any subsequent contingency.

So where the note was to pay within a certain time after such a ship was paid off¹; it was holden good; because the ship would certainly be paid off one time or other (71).

i Andrews v. Franklin, H. 3 Geo. 1. B. R.

(71) In Strange's report of this case, 1 Str. p. 24. the opinion of the court is thus given: "the paying off the ship is a thing of a public nature; and this is negotiable as a promissory note." I have stated the case as it was cited by Willes, C. J. delivering the opinion of the court in *Colehan v. Cooke*, Willes, 399. See also Mr. Hume Campbell's argument in *Evans v. Underwood*, 1 Wils. 263; where, in citing this case, he states the opinion of the court to have been, that the note was within the statute and negotiable, *because the paying off the ship was morally certain*. The same point was decided by Hardwicke, C. J. in *Lewis v. Orde*, Middx. Sittings, 8 Geo. 2. The note was in this form; "I promise to pay J. S. £11 at the payment of the ship Devonshire, for value received." Willes, C. J. in *Colehan v. Cooke*, Willes, 399. says, this case was determined on the same reason as *Andrews v. Franklin*, viz, that *the ship would certainly be paid off one time or other*, which seems to be the true reason; but in the report of *Lewis v. Orde*, Dict. Trade & Com. 261. copied by Cunningham, p. 127. of Law of Bills and Notes, 2d ed. 1761. Lord Hardwicke is made to say, "That as to the contingency of the payment, the subsequent act of the payment of the ship makes it certain, and therefore, though not a lien *ab initio*, yet sufficiently so, and within the statute, by the fact happening after;" and in a MS. note in the possession of the editor, Lord Hardwicke is made to say, "as to the time, this note is certainly within the statute, if it had been made payable at any precise future day; and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to certainty as if the day had been mentioned at first. But if the promise is to pay out of any particular fund, it is not a personal lien, and therefore not within the statute." It may be observed, that this reason clashes with the opinion of the court in *Colehan v. Cooke*, Willes, 399. where it was said, that if the notes were not within the statute *ab initio*, they should not be made so by any subsequent contingency, and with the decision in

See further on this subject, *Hausoullier v. Hartsinck*, 7 T. R. 733.

Bankers' cash notes, or goldsmiths' notes^k, as they were formerly called, goldsmiths at that time being bankers, are promissory notes given by bankers, payable to order or bearer, on demand, and are stated as such in pleading. They are considered as cash, are transferrable by delivery, but may be indorsed, in which case they may be declared on as a bill of exchange against indorser. At present cash notes are seldom made, except by country bankers, their use having been superseded by the introduction of checks.

Joint and several Notes.—A note beginning "I promise to pay," and signed by two or more persons, is several as well as joint^l.

If a promissory note appears on the face of it to be the separate note of A. only, it cannot be declared on as the joint

^k Chitty, p. 239. ed. 2d.

^l *March v. Ward*, Peake's N.P.C. 130

Carlos v. Fancourt, 5 T. R. 482. and in *Hill v. Halford*, 2 Bos. & Pul. 413. in which cases the events on which the notes were to become payable were averred in the declarations to have taken place, and yet the notes were holden not to be good. See also *Kingston v. Long*, Bayley, 71, where it was holden by the court, that if an instrument was not a bill of exchange when drawn, it could never afterwards become one. To the foregoing cases of *Andrews v. Franklin*, and *Lewis v. Orde*, may be added that of *Evans v. Underwood**, where the note was to pay A. by order B. upon the receipt of his the said A.'s wages, due from his Majesty's ship the Suffolk, it being in full for his wages and prize money, and short-allowance money, for the said ship; the declaration stated an indorsement by A., and averred that the defendant received the said wages from the said ship. After verdict for plaintiff, on motion in arrest of judgment, the case of *Andrews v. Franklin* was mentioned, which Mr. Ford, for the defendant, said had never been determined. The court said, that they would look into the case, and see whether it had been determined. The reporter adds, that the court inclined to give judgment for the plaintiff, and after looking into the case, did so, *ut audiui*. In *Beardesley v. Baldwin*, E. 15 G. 2. B. R. MS. the court said, that as to *Andrews v. Franklin*, if it ever was determined, which they could not find, it must have been decided on the certainty observed in the return of ships, and which must be looked upon as an event in itself not contingent.

note of A. and B., although given to secure a debt for which A. and B. were jointly liable^m.

In an action by A. against B. upon a promissory noteⁿ, it was stated in the declaration, that B. and another, jointly or severally, promised to pay it. It was holden, that the declaration was good; for *or* was synonymous to *and*. They both promised that they or one of them should pay; consequently both and each were liable *in solidum*.

If an action is brought on a joint note^o, and some of the persons making the note are not made defendants, advantage can be taken of the omission by plea in abatement only (72).

An action was brought against defendant only on a joint and several note made by defendant and one Stoddart^p. Plea non assumpsit. Defendant gave in evidence an agreement in writing entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 600*l.* in lieu of 883*l.* actually due from the bankrupt on this note (which was for 100*l.*) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was resisted on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note, that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that defendant should be discharged. But per Lord Mansfield, C. J. the plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties, the principal cannot be released without its operating for the benefit of the surety. Rule discharged.

Consideration.—It will be presumed, that the note has been given for a good and valuable consideration until the contrary appear. As between the immediate parties, want or illegality of consideration may be insisted on as a defence.

^m Siffkin v. Walker and another, 7 Camp. N. P. C. 308. ⁿ Bailey v. Lye, B. R. II. 52 G. 2. S. P.
^o Rees v. Abbott, Comp. 832.

^p Per Buller J. in Rees v. Abbott, Comp. 832.

^q Garrett v. Jull, B. R. M. 22 G. 2. MS.

(72) This is a general rule. See Rice v. Shute, 5 Burr. 2611. and other cases cited in note (64), ante, p. 115.

In an action by the payee against the maker of a promissory note for 10^l.^q which had been given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound; it appeared at the trial, that in the indentures of apprenticeship no mention had been made of this premium having been given with the apprentice, nor was there any stamp thereon in proportion to the value, as required by stat. 8 Ann. c. 9. in default of which, by the 39th section of the stat. the indentures are declared to be void. The apprentice remained some part of his time with his master, and then absconded. It was objected, on the part of the defendant, that the indentures being void, the consideration of the note had failed. To this it was answered, that the avoiding of the indentures could not collaterally affect this note; but that at all events it was sufficient, if there were any consideration to sustain it; and here the master had provided board and lodging for some time for the apprentice. But Lawrence, J. was of opinion, that the consideration was entire, and that it had wholly failed. The Court of King's Bench concurred in opinion with the learned judge.

Where the action is brought not as between immediate parties, and the plaintiff is a *bonâ fide* holder for a valuable consideration, without notice, such illegal consideration only as makes the note void *ab initio*, viz. gaming^r and usury^s can be alleged in bar of the action.

In an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against defendant in a lottery insurance: Kenyon, C. J. was of opinion, that the plaintiff was intitled to recover, observing that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent indorsee be deprived of his remedy on the note; and that a contrary determination would shake paper credit to the foundation^t.

A person, who at the request of the holder of a note, has put his name upon it, and in consequence thereof has been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew that the note was originally given for

q Jackson v Warwick, 7 T. R. 121.
r Stat. 9 Ann. c. 14. s. 1. ante, p. 305.
and Bowyer v. Bampton, Str. 1155
s 12 Ann. st. 2. c. 16. s. 1. ante, p. 305.
Lowe v. Waller, Doug. 733.

t Winstanley v. Bowden, Middx. sittings after M. T. 41 G. 3. B. R. MSS.

an illegal consideration, viz. for premiums for the insurance of tickets in the lottery^a.

Stamp.—Every promissory note must be duly stamped, that is, with a stamp of the proper value and proper denomination.

A promissory note^a, given at the time when the 31 Geo. 3. c. 25, was the only statute regulating the stamp-duty on promissory notes, was holden not available in law, because it was stamped with a receipt stamp, although it was of equal value with that required for a promissory note.

For the amount of the stamp duties on promissory notes, see stat. 55 Geo. 3. c. 184.

For the statutes⁷ regulating notes given for a less sum than five pounds, see Chitty on Bills, Appendix, sect. 8, ed. 2nd.

X. *Of the Time when a Note ought to be presented for Payment.*

PAYMENT must be demanded within a reasonable time after the note becomes due. Whether a note has been presented for payment within a reasonable time is a question of law, but dependent on facts, viz. the situation of the parties, their places of abode, and the facility of communication between them^a.

On promissory notes, payable at a certain time after date, or after sight, three days grace are allowed; consequently, payment of such notes ought not to be demanded until the last of the three days, unless it happen to be a Sunday, or a great holiday, in which case payment ought to be demanded on the next preceding day. The three days of grace are computed exclusively of the day on which the payment is by the tenor of the note to be made. It has not been determined solemnly, whether days of grace are to be allowed on notes payable at sight^b. They are not allowed on notes payable on demand.

^a Seddons v. Stratford, London Sit-
tings after T. T. 34 G. 3. Keayon
C. J. Peake's N. P. C. 215.

^x Chamberlain v. Porter, 1 Bos. and
Pul N R 10.

y 15 G. 3. c. 51. 17 G. 3. c. 30. 37
G. 3. c. 93.

^a Darbshire v. Parker, 6 East, 3.

^b See this question discussed in Chit-
ty's Treatise on Bills, p. 195, ed. 2d

Where a note is made payable at a month or months after date, the computation must be (contrary to the general rule of law) by calendar and not by lunar months.

Where a note is in the hands of an indorsee, and he demands payment thereof from the maker, who refuses or omits to pay the same, notice of such refusal or default ought to be given by the indorsee himself to the prior indorser or indorsers (if more than one) within a reasonable time; otherwise the indorser will be discharged.

Action against defendant, as indorser of this note⁴, "one month after date, I promise to pay to Wm. George, or order, the sum of 15*l*. for value received." John Hopley. Indorsed, Wm. George. This note George had given in payment to the plaintiff; it became due 2d May, and on 5th May the plaintiff's banker (after three days grace) demanded it of Hopley. Hopley desired two or three days time to pay it in, and so from time to time, which were given him, till 13th May, when he told the banker he could not pay it. On the 14th, Hopley failed, and became a bankrupt. On plaintiff's applying to George for payment, George told him he should have applied before, on Hopley's first refusal, and that he now did not think himself liable to pay it, whereupon this action was brought. Lord Mansfield, C. J. "The question is, who is to bear the loss, as Hopley, the drawer, has failed? Now it is so necessary for trade, that where a bill of exchange is drawn on one man, and made payable to another, that, if the person to whom it is payable, either wilfully or through neglect, omits to call at the time it becomes due, it is the constant course of mercantile custom in the city of London, that he shall bear the loss and not the other. This likewise is the rule on indorsed notes, which are in nature of inland bills of exchange; nothing is so certain as this rule, and great inconvenience would follow from a different mode of proceeding. It has been truly said, that the law has not fixed any precise time when the neglect of the indorsee shall be said to make him liable; but I remember a case determined, where a bill became due at two o'clock on Saturday afternoon, the person who gave the note became a bankrupt at five o'clock on Monday afternoon; the question was, whether the indorsee had not neglected to call for his money, and it was holden, that he had. The present case is not that of neglect; the note is dated on 2d April, consequently becomes due on 2d May, but by the custom of the city there are three days of grace; the banker, who has the note in his hands, and who in this

⁴ See *Timbal v. Brown*, 1 T. R. 167.
id. *Andersen v. George*, London sit-

tings after Trin. T. 1757. coram
 Lord Mansfield, C. J. 1388.

case, being the plaintiff's agent, is to be considered as one and the same person with the plaintiff, comes on 5th and demands payment; the indorser and all the parties live in town; the banker gives Hopley indulgence to pay it from 5th to 13th, without giving any notice to the indorser, which, if he had done, it would have urged the indorser to get his money. Now here is no neglect of application. The case is still stronger; here is an actual credit given for eight days, and the question is, who gave the credit. We cannot go into any consideration of Hopley's circumstances at the time; they might be very bad; and yet if he had been arrested on 5th May, we cannot say he would not have paid the money. I am therefore of opinion, that the loss, (though this is a hard case,) ought to be borne by the person who gave the credit." Verdict for the defendant.

Action against the defendant as indorser of a promissory note, due May-5th, 1802. The plaintiff proved the defendant's indorsement; and also, that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its non-payment being given to the defendant, nor did it appear that when the defendant so promised to pay, he knew of any application for payment having been made to the maker. For the defendant it was contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder. In the cases hitherto decided upon this subject, something appeared which might be considered a waiver of any irregularity, with regard to the bill or note, which could not be inferred from a mere promise to pay, at a time when the party, without being aware of it, was discharged from his liability. But Bayley J. held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented, when due, to the acceptor or maker, and to receive notice of its dishonour, promises to pay it; this is presumptive evidence of the presentment and notice, and he is bound by the promise so made. Verdict for the plaintiff.

But if the drawer or indorser, after being arrested without acknowledging his liability, merely offers to give a bill by way of compromise for the sum demanded, which offer is rejected, this does not supersede the necessity of notice.

XI. Of the Declaration—Pleadings—Evidence—Conclusion.

THE usual remedy on a promissory note is an action of assumpsit. In the first count of the declaration, the note ought to be set forth accurately, that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a variance in any material point, between the statement in the declaration and the note produced in evidence, will be fatal.

As where in an action on a promissory note^g, made by the firm of Austin, Strobell, and Shirliff, who were declared against by the name of William A., Robert S., and William S., and it was proved that the firm consisted of William A., Daniel S., and William S., it was holden that the variance was fatal.

Where the maker of a promissory note makes a memorandum at the foot of it^h, that he will pay it at the house of A., as this does not form any part of the contract, it is not necessary to state it in the declaration; but if it forms a part of the body of the note, it must be stated, and it must be averred, that the note was presented for payment at that place, even in an action against the makerⁱ.

In cases where several notes have been made by the defendant, and which are due and payable, a count on each note ought to be inserted in the declaration.

To the special count or counts, such of the common counts ought to be added as may be adapted to the circumstances of the case.

Although on a count for money lent, or for money had and received, a promissory note may be given in evidence^k, as affording a presumption that so much money was lent, or had and received, and although the jury, in case such evidence be not rebutted, will conclude against the defendant, yet it is advisable to declare specially on the note; for otherwise, in the case of a judgment by default, the usual reference to the master in B. R. or prothonotary in C. B. cannot be made to compute principal, interest, and costs^l.

^g Gordon v. Austin, 4 T. R. 621.

^h Sanderson v. Judge, 2 H. Bl. 509.

ⁱ Sanderson v. Bowes, 14 East, 506.

adjudged on demurrer. See also

Roche v. Campbell, 3 Camp. N. P. C. 247.

^k Str. 725.

^l Osborne v. Noyes, 8 T. R. 649.

Where a note is payable to A, or order, and indorsed, the indorser is considered as a warrantor of the note; and, therefore, it is necessary, in an action brought against the indorser, to allege and prove a demand of the maker^m, and notice of default or refusal to pay within a reasonable time by the holder himselfⁿ.

To an action on a promissory note, any plea may be pleaded which the law permits to be pleaded to actions founded on contract, e. g. accord and satisfaction, coverture, infancy, payment, statute of limitations, set-off, tender; as to which, see ante, tit. Assumpsit, s. IV. p. 114.—153.

To an action of assumpsit by A., B., and C., against D., as one of the indorsers of a promissory note drawn by E., in favour of C., D., (and himself) E., then in partnership, and by them indorsed to A., B., and C.; defendant pleaded in bar, that C. one of the plaintiffs, was liable as an indorser, together with D. On special demurrer the plea was holden to be good; Lord Eldon, C. J. observing, that the subject of this plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the plaintiff can have no action at all. The effect, however, of a judgment for the defendant would be, that if a man made a note to himself and others carrying on business under a particular firm, and that partnership was dissolved, the promissory note could neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering, therefore, the quantity of circulating paper in this country, standing under the same circumstances with the note in question, the consequence of such a decision might be highly injurious. However, the case of *Mossatt v. Van Millingen*^p was unanswerable.

Evidence.—In an action on a promissory note, to which the general issue is pleaded, the plaintiff must prove every material allegation in the declaration.

It is a general rule, that to prove the contract the original note must be produced in evidence. This rule is dispensed with in special cases only, as where it can be proved, that the note has been lost or destroyed by the defendant^q, or that it is in the hands of the defendant, and that he has had notice to produce it^r. In these cases a copy of the note, or parol evidence of its contents, may be received.

^m Adjudged in *C. B. E. 4 G. 2.* cited by Lee, C. J. in *s. Str. 1087.* recognised by Lord Mansfield, C. J. in *s. Burr. 676.*

ⁿ *Tindal v. Brown*, 1 T. R. 167.

^o *Mainwaring v. Newman*, 2 Bos. & Pul. 120.

^p 27 G. 3 B. R. 2 Bos. & Pul. 134. n. (c.)

^q Lord Raym 731.

^r 2 Bos. & Pul. 39.

The remaining evidence necessary to support the action will vary according to the character in which the parties bring the action.

In an action by *payee* against the maker, the hand-writing of the maker must be proved by the subscribing witness, if any; if not, by some person who is competent to prove such hand-writing. In an action, by *first indorsee* against the maker, the same evidence as in the preceding case, together with proof of the indorsement to the plaintiff, will be necessary. In an action against an indorser, proof of the hand-writing of the maker, or of any indorser prior to the defendant (except the first,) unless specially alleged in the declaration, is not necessary; but in this case it must be proved that payment was duly demanded of the maker, and that the maker refused to pay, or made default therein, and that notice of such refusal or default was given to the defendant within a reasonable time.

In an action against the *maker* of a note, although the promise he to pay the money at a particular place, it is not necessary to prove a presentment at that place¹; if the place of payment be mentioned in the margin or at the foot of the note¹.

If a bill be payable or indorsed specially to a firm, evidence must be given that the firm consists of the persons who sue as plaintiffs; *secus*, if the indorsement be in blank. *Ord v. Portal*, 3 Camp. N. P. C. 239.

A. being in insolvent circumstances², B. undertook to be a security for a debt owing from A. to C. by indorsing a promissory note made by A. payable to B. at the house of D. The note was accordingly so made and indorsed, with the knowledge of all parties. Just before it became due, B. having been informed that D. had no effects of A. in his hands, desired D. to send the note to him, B., and said he would pay it, B. having then a fund in his hands for that purpose; the note was not presented at D.'s house till three days after it was due. It was holden, that C. could not maintain an action against B. on the note, not having used due diligence in presenting the note as soon as it was due to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case.

In an action by a *second, third, or any subsequent indorsee*, against the maker, where the first indorsement is in blank;

¹ *Nicholls v. Bower*, 2 Camp. N. P. C. 1. *Price v. Mitchell*, 4 Camp. 800.
² 498 But see *Sanleiman v. Bower*, u *Nicholson v. Genthit*, 2 H. Bl. 609.
 ante, p. 374.

as the plaintiff is not bound to set forth any indorsement, except the first, but may strike out the others, if he adopts this course, the proof will be the same as in the preceding case; but if all or any of the indorsements subsequent to the first are set forth, they must be proved.

The defendant cannot give in evidence a parol agreement entered into when the note was made, that it should be renewed, when it became due^x; for this would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles.

An indorser on a note^y, who has received money from the payee to take it up, is a competent witness for the maker in an action against him by the indorsee, to prove that he had satisfied the note, being either liable to the plaintiff on the note, if the action is defeated, or to the defendant for money had and received, if the action succeeds; and his being also liable, in the latter case, to compensate the defendant for the costs incurred in the action, by such non-payment, makes no difference.

In an action by the indorsee against the maker of a promissory note^z without original consideration, if the payee has become bankrupt, and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendant, for he is no longer liable to the plaintiff; but would be liable to the defendant, if the latter were obliged by this action to pay the promissory note drawn for his accommodation.

Conclusion.—The limits prescribed to this abridgment will not permit the insertion of any more cases under this head, nor indeed is it necessary; for although a promissory note^a, while it continues in its original shape, does not bear any resemblance to a bill of exchange, yet when it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee; the indorser is as it were the drawer, the maker of the note the acceptor, and the indorsee the payee.

From this resemblance between a bill of exchange and promissory note, it follows that many of the rules which are applicable to bills of exchange, hold also in the case of promissory notes.

^x Hoare v. Graham, 3 Camp. N. P. C. 57.

^y Birt v. Kershaw, 2 East, 458. recognised by Sir W. Grant, M. R. in Paul v. —, administrator of Hamilton, Privy Council, 29 June, 1805.

^z Manndrell v. Kennett, London sittings, H. T. 49 G. 3. Bayley J. 1 Camp. N. P. C. 408 n.

^a Per Lord Mansfield C. J. Heylin v. Adamson, 2 Burr. 676.

CHAP. X.

CARRIERS.

- I. *Of common Carriers and their Responsibility.*
- II. *Of Notices given by common Carriers for the Purpose of limiting their Responsibility, and the Manner in which such Notices have been construed.*
- III. *Of the Lien of Carriers.*
- IV. *By whom Actions against common Carriers ought to be brought.*
- V. *Of the Declaration.*
- VI. *Of Payment of Money into Court.*
- VII. *Evidence.*

I. *Of common Carriers and their Responsibility.*

MASTERS^a and owners of ships, hoymen, wharfingers,^b lightermen, barge owners^c, proprietors of waggons, stage coaches (1) &c. are denominated common carriers; and by

^a *Morse v. Slue*, 2 Lev. 69.

^b *Maving v. Todd*, 1 Starkie's N. P. C.

72.

^c *Rich v. Kneeland*, Cro. Jac. 330.
Hob. 17. S. C.

(1) It was ruled by Holt, C. J. in *Upshere v. Aidee*, B. R. London Sittings, H. 8 W. 3. Comy. 25 that a *hackney* coachman was not a common carrier within the custom of the realm, and could not be charged for the loss of a passenger's goods, except where there was an express agreement, and money paid for the carriage of the goods. And in *Middleton v. Fowler*, Salk. 282. there was a like determination by Holt, C. J. at N. P. in regard to *stage* coachmen, except such as took a distinct price for carriage of goods, as well as persons. But in a late case of *Clarke v. Gray*, 4 Esp. N. P. C. 177. where an action was brought against the proprietor of a stage coach, to recover the value of a trunk which had

the custom of the realm⁴, that is, by the common law, are bound (2) to receive and carry the goods of the subject for a reasonable hire or reward (3), to take due care of them in their passage, to deliver them⁵ safely (4), and in the same con-

d 1 Roll. Abr. 2 (C) pl 1

c Per Popham, C J Owen, 57

been lost while the plaintiff was travelling in the defendant's coach, the defendant proved that he had given notice, that he would not be liable for any parcel of above £5 value, unless paid for as such; it was however contended for plaintiff, that this notice applied to the case of goods sent to be carried only, and not to the case of passengers' luggage. But Lord Ellenborough, C. J. said, that it had been decided, that the luggage of passengers came within the exception. So per Chubbidge, J. 2 Bos. & Pul. 419. "It has been determined, that if a man travel in a stage coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." If a coachman commonly carry goods, and takes money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's. Nisi Prius opinion of Jones, J. in Lovett v. Hobbs, 2 Show. 127.

(2) An action on the case will lie against a common carrier for refusing to carry goods after an offer of his hire. Jackson v. Rogers, 2 Show. 327.

(3) In an action against a common carrier for losing a box by negligence, a motion was made in arrest of judgment, because a particular sum was not mentioned in the declaration to be paid for hire, but a reasonable reward only; the declaration was holden to be well enough, for, perhaps, there was not any agreement for a sum certain; yet as in such case the carrier may maintain a *quantum meruit*, he is equally liable, as where there is an express agreement for a particular sum. Bastard v. Bastard, 2 Show. 81. Agreed also in Lovett v. Hobbs, 2 Show. 129.

(4) In Golden v. Manning and another, 2 Bl. Rep. 916. where an action was brought against carriers for not delivering goods within a reasonable time, the question was agitated whether it was the duty of carriers to deliver as well as carry goods. The court declined giving any opinion on the general question, conceiving that under the special circumstances of the case then before them, the defendants were liable, because it appeared that their general course of trade was to deliver goods at the houses to which they were directed, that they received a premium, and kept a servant for that special purpose, and that they must be understood to have contracted to carry the goods in question, on the same terms, and in the same manner, that they carried the goods of other persons. Gould, J. expressed an opinion, that all carriers were bound to

dition as when they were received, or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody, except such loss or damage as arises from the act of God (5), as storms, tempests, and the like; or of the enemies of the king.

In an action brought against a common carrier by water^f, charging the defendant with negligence, it was holden to be no defence, "that the ship was tight, when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole through which the water gushed;" on the ground that whatever was not excused by law, was to be deemed a negligence in the carrier, and that he was answerable in all events, except where the goods were damaged by the act of God, or the king's enemies.

So where the proprietors of the Trent navigation^g, had undertaken to carry goods from Hull to Gainsborough, and the vessel, on board which the goods were placed, drove against an anchor in the river Humber, and sank; it was holden, that the carriers were responsible to the owner of the goods for the damage sustained; although it was proved,

^f Dale v. Hall, 1 Wils. 281.

^g Proprietors of the Trent Naviga-

tion v. Wood, E. 25 G. 3. B. R.
3 Esp. N. P. C. 127.

give notice of the arrival of goods to the persons to whom they were consigned, whether bound to deliver or not. In *Hyde v. the Trent and Mersey Navigation Company*, 5 T. R. 396. the general question, whether a carrier was bound to deliver the goods to the person to whom they are directed was again agitated; Ashhurst, Buller, and Grose, Js., were of opinion that a carrier was so bound; but Kenyon, C. J. appears to have inclined to the contrary opinion. The special circumstances of the case (which see post, p. 381.) rendered it unnecessary for the court to decide the general question.

(5) The plaintiff put goods on board the hoy of the defendant, who was a common carrier; coming through bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled. Pratt, C. J. held the defendant not answerable; the damage having been occasioned by the act of God. For, though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind had entirely varied the case. The plaintiff's counsel having offered some evidence, that if the hoy had been in a better condition it would not have sunk, the Chief Justice said that a carrier was not obliged to have a new carriage for every journey; it was sufficient, if he provided one which, without any extraordinary accident, (such as this was) would probably perform the journey. *Amies v. Stephens*, Str. 128.

that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay: the court, observing, that there was a degree of negligence in the master of the vessel also; for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor: and even if there had not been any actual negligence, yet negligence in law was sufficient.

A common carrier being an insurer in all cases (except the two before mentioned) is responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are remaining in his custody (6) *as a common carrier*.

As where the goods intrusted to a common carrier were consumed by an accidental fire^b, communicating to a booth where the goods had been deposited by the carrier in the course of the journey, it was holden, that the carrier was liable, although the jury found, that the goods were consumed without any actual negligence on the part of the carrier.

So where common carriers from A. to B^c, charged and received for cartage of goods from a warehouse at B. (where they usually unloaded, but which did not belong to them) to the house of the consignee in B., it was holden, they were

^b Forward v. Pittard, 1 T. R. 27.

^c Hyde v. Trent and Mersey Navigation, 5 T. R. 329.

(6) In an action by the East India Company against a lighterman, on an undertaking to carry for hire on the river Thames, from the ship to the Company's warehouses, it appeared, that it was the usage of the Company, on the unshipping their goods, to put an officer, called a guardian, in the lighter, who, as soon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to see them safely delivered at the warehouse. This had been done in the present case, and part of the goods were lost.—Raymond, C. J. was of opinion, that this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the Company's servant, who had hired the lighter to use himself; he thought, therefore, that the action was not maintainable, and the plaintiffs were non-suited. East India Company v. Pullen, Str. 690. It was observed by Chambre, J. in 2 Bos. & Pul 419. that the foregoing decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to the officer, called the guardian.

responsible for a loss by an accidental fire while the goods were in that warehouse; although they allowed the profits of the cartage to another person, and that circumstance was known to the consignee.

But where the goods are not remaining in the defendant's custody as common carrier^k, he is not liable; as where the goods had been carried by the defendant from A. to B., and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance, (the owner not paying the defendant any thing for the warehouse room) and were consumed by an accidental fire there, it was holden, that the defendant was not liable. And it has been holden, that a carrier may exclude all responsibility for a loss by fire, by a notice to that effect^l.

If a common carrier be robbed of the goods^m, he shall answer the value of them; for *having his hire*, there is an implied undertaking for the safe custody and delivery.

Where a person undertakes to carry goods safely and securelyⁿ, he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour (7); and this

k *Garside v. Trent and Mersey Navigation*, 4 T. R. 591. m 1 Inst. 80. n *Woodleffe v. Curties*, 1 Rol. Abr. 2. (C) pl. 4. S. P.
l *Maving v. Todd*, 1 Starkie, N. P. C. 72. n *Coggs v. Bernard*, Lord Raym. 909.

(7) In a special action on the case, wherein the plaintiff declared that, whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently, that he lost it by the way, to the damage of the plaintiff of £10. On demurrer to the declaration, it was objected by Hawkins, Serjeant, that the plaintiff had not declared on the general custom of the realm relating to carriers, and, therefore, the defendant must be taken to be a private person; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. 2dly. The plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which promise the action was brought. Probyn and Reynolds (the only judges in court) as to the first objection admitted, that the defendant must be taken to be a private person; but it was determined in *Coggs v. Bernard*, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration; and the only difference was, that a common carrier was obliged to undertake the carriage of goods, and a private person was not; but if a private person voluntarily undertook it, he was by law answerable for damage arising from his negligence. As to the second objection, the court said, that the

rule holds, although the plaintiff, for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen^o.

Coach owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the oversetting of the coach from the horses taking fright, there not being any negligence in the driver^p; but otherwise it is, if there be negligence in the driver.

The proprietors of a mail coach are answerable for an injury sustained by a passenger, through the misconduct of their driver. *White v. Boulton, Peake's N. P. C. 81.*

A, a stable keeper, let to B, four horses to draw B's carriage from C. to D. The horses were rode by A's servants. Through their negligence, the carriage of I. S. sustained an injury. It was holden, that I. S. might maintain an action against A. *Sammell v. Wright, 5 Esp. N. P. C. 268.*

II. *Of Notices given by common Carriers for the Purpose of limiting their Responsibility, and the Manner in, which such Notices have been construed.*

THE general responsibility of common carriers under all circumstances, except those before mentioned, has induced them to make special contracts for the carriage of goods beyond a certain value, and to require a premium in proportion to the risk. In this case, if the premium is not paid, the carrier will not be answerable (8). That the public may

^o *Robinson v. Duumore, 2 Bos. and P. 416.* ^p *Aston v. Heaven, 2 Esp. N. P. C. 533.*

delivery was implied; for it was stated, that the defendant had carried the hare part of the way, which he could not have done without a delivery; and as for the breach of promise, the action was not brought for that, but for the loss of the hare; the promise was only inducement. Accordingly they gave judgment for the plaintiff. *Hutton v. Osborne, B. R. M. 3 G. 2. MSS.*

(8) A bag sealed was delivered to a carrier, and said to contain £200, and the carrier gave a receipt for so much, when in fact it contained £400: the carrier was robbed; it was ruled by Holt, C. J.

be informed of the nature of these special undertakings, it is usual for carriers, either to insert in the newspapers, or to distribute hand bills, or to place in a conspicuous situation in the office, or other place appointed for the reception of the goods, an advertisement in the form following: "Take notice, that the proprietors of coaches, &c. transacting business at this office, will not be accountable for any passengers' luggage, money, plate, jewels, watches, writings, goods, or any package whatever, (if lost or damaged,) above the value of 5*l.* unless insured and paid for at the time of delivery." (9).

The validity of these general notices was questioned in a modern case¹, and it was insisted, that they were contrary to the policy of the common law; and that it was the duty of the carriers, if the reward was not adequate to the risk, to make special acceptances of the goods in such case, at a rate proportioned to the value of the goods. But by Lord Ellenborough, C. J. (who delivered the judgment of the court) "considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation, and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in

¹ *Nicholson v. Willan*, 5 East's R. 507. See also *Lyon v. Mills*, 5 East's R. 423. where the same point was made, but the court did not give any opinion upon it.

that he should be answerable only for £200, for his reward extended no further. *Tyly v. Morrice*, Carth. 485. If a box is delivered to a carrier generally, and he accepts it so, he is answerable, though the party did not inform him that there was money in it; but if the carrier asks, and the owner says, there is not any money, or if the carrier accepts it conditionally, provided there is not any money in it, it was holden by King, C. J. that the carrier was not liable in either of these cases. *C. B. Titchburn v. White*, London Sittings, Str. 145. See post. p. 387. n. (11).

(9) The terms of these notices vary.* The provisions of some are of such a nature as to go in discharge of the liability of the carrier entirely, unless the terms of the notice are complied with (see a notice of this kind in *Clay v. Willan*, 1 H. Bl. 298.); others limit the responsibility of the carrier to a certain sum, if the conditions are not complied with. (See this kind of notice in *Clarke v. Gray*, 6 East's R. 564.) *

certain cases, on the ground of such a measure having been unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility; considering also, that there is no case in the books, in which the right of a carrier, thus to limit by special contract his own responsibility, has ever been by express decision denied: we cannot do otherwise, than sustain such right in the present instance, however liable to abuse, and productive of inconvenience it may be; leaving to the legislature (if it shall think fit) to apply such remedy hereafter, as the evil may require."

The following cases will illustrate the manner in which these notices have been construed.

The defendants, who were proprietors of a coach^r, gave notice, "that cash, plate, jewels, writings, or any such kind of valuable articles, would not be accounted for if lost, of more than 5*l*. value, unless entered as such, and a penny insurance paid for each pound value." The plaintiff sent a parcel, consisting of light guineas, to go by the defendants' coach; but the person, who was employed by the plaintiff, to deliver the parcel, although acquainted with the terms on which the defendants carried valuables, paid two shillings only for the parcel, and two-pence for the booking. On the part of the plaintiff, it was insisted, that he was intitled to recover as far as 5*l*. by the terms of the notice: but the court were of opinion, that the fair construction of the notice was, that the defendants were not liable to any extent (10).

So where the defendants had given notice^r, that they would not be accountable for any parcels, &c. of more value than 5*l*. unless entered as such, and paid for accordingly; it was holden, that the owner of a parcel above the value of 5*l*. (which had been delivered to the defendants, and lost, but which had not been entered and paid for according to the value) was not entitled to recover *any thing*.

A parcel above the value of 5*l*.^t, was delivered to the defendants (who were proprietors of the mail, and of a heavy coach travelling the same road) and accepted by them to

^r *Clay v. Willan*, 1 H. Bl. 298.

^t *Nicholson v. Willan*, 5 East's R. 207.

^s *Izett v. Mountain*, 4 East's R. 371.

(10) *Pigott v. Dunn*, B. R. E. 36 G. 3. S. P. cited by Lawrence, J. in *Yate v. Willan*, 2 East's R. 134.

be conveyed by the mail. Notwithstanding this acceptance the parcel was booked to go by the heavy coach. The parcel was lost, but it did not appear in what manner. At the trial it was proved that the owner had notice of an advertisement placed in the coach-office, in terms the same as that which is set forth in p. 384. of this work. The parcel in question had not been booked and paid for according to the terms of the notice. On the part of the owner of the parcel it was insisted, that the loss had not been incurred in the course of the defendants' employment as carriers, but had been occasioned by an act of tortious conversion in direct contravention of the terms on which the goods were delivered to and accepted by the defendants. But it was holden, that the evidence on which this argument was founded, viz. the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, amounted only to a negligent discharge of duty in their character as carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect of the goods; and as the goods in question were above the value of 5*l.*, and had not been insured and paid for at the time of the delivery, the defendants were not accountable for the same, and consequently the plaintiffs were not intitled to recover any thing.

A carrier gave notice, that he would not be accountable for goods above the value of 20*l.*, unless entered, *and an insurance paid, over and above the price charged for carriage, according to their value.*—The plaintiff caused a parcel of silk exceeding the value of 20*l.* to be delivered and booked at the warehouse in London, where the waggon set out; but did not pay any thing for insurance.—The goods were lost.—It was holden that the plaintiff was not intitled to recover*.

* An action was brought against the proprietors of a stage coach* for not safely carrying 100*l.* delivered to their book-keeper in a bag, from B. to L., and on the trial it appeared, that the money was put into a bag and carried by the plaintiff's servant to the defendants' house, and there delivered to their book-keeper, who did not ask any questions as to the contents of the bag, but took it as a common parcel, and was paid for as such by the servant, who did not give him any information about it; the money was lost; and the servant on his cross-examination swore, that he did not re-

u Harris v. Puckwood, 3 Taunt. 264. x Gibbon v. Paynton and another, B. R. E. 9 G. 3. Bull. N. P. 71. and 4 Burr. 2099.

ceive any particular instructions about the carriage, but only to deliver the parcel to the book-keeper, and pay what was demanded of him for the carriage: the defendants proved that an advertisement had been put into the country newspaper, once every month for two years together, concerning the carriage of parcels by this stage coach, with a N. B. at the bottom of it, that the proprietors would not be answerable for any money, plate, jewels, writings, or other valuable goods, unless they were entered as such, and paid for accordingly; and that this paper was taken in at the house where the plaintiff lodged, who was frequently seen with it in his hand, and appeared to be reading it. The jury found a verdict for plaintiff. On motion for new trial, the court of King's Bench held, that the defendants were not liable to answer for this money; for a carrier is only liable in respect of the reward which he receives: and in the present case there was a clear fraud (11), committed by the plaintiff. And per Yates, J. here is a full proof of special acceptance, and a deceit on the part of the plaintiff; for it is

(11) The plaintiff delivered to the defendant *, a carrier, a box, telling him only, that there was a book and tobacco in the box, whereas, in fact, it contained 100*l*. Roll, C. J. was of opinion, that, as the carrier had not made a special acceptance, he was answerable; but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages; but the jury gave a verdict for 97*l*. against the carrier, which (as the reporter adds) *durum videbatur circumstantibus*. Lord Mansfield, C. J. cited this case in *Gibbon v. Paynton*, 4 Burr. 2301. observing, that he should have agreed in opinion with the *circumstantibus*.

A box, in which there was a large sum of money was brought to a carrier, who demanded of the owner what was in it; he answered, that it was filled with silk, and such like goods of mean value; upon which the carrier took it, and was robbed †. And resolved, that he was liable; but if the carrier had told the owner, that it was a dangerous time, and if there were money in it, he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier.

Lord Mansfield, C. J. in *Gibbon v. Paynton*, 4 Burr. 2301. commenting on the preceding case and the observations annexed to it, said, that he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money; for it was artfully concealed from him that there was any money in the box. See ante, note (8) of this chapter.

* *Kenrig v. Eggleston*, Aleyn, 92.

† Case cited by Hale, in *Morse v. Slue*, 1 Vent. 222.

not necessary that there should be a personal communication (12), in order to make a special acceptance. The reason of a personal communication is, that each party may know the other's mind, and, therefore, if they know each other's mind in any other manner, that is sufficient. It has been said, however, in one case¹, that a carrier cannot insist on the terms of the notice not having been complied with in a case where from the nature and bulk of the commodity *e. g.* a pipe of brandy, he must have been apprized that the value exceeded five pounds. But in another case², Gibbs, C. J. ruled that where a party does not enter and pay for his goods as of greater value than 5*l.*; although the carrier may infer from other circumstances that they are of greater value than 5*l.*, still he may take the benefit of the notice; and that mere knowledge that the goods are of greater value than 5*l.* is not sufficient to deprive the carrier of that benefit. In Beck v. Evans, gross negligence and non-feasance were proved on the part of the carrier's servant. And in Down v. Fromont³, Lord Ellenborough ruled, that unless the appearance of the goods necessarily indicated that they were above the value of 5*l.* the

¹ Beck v. Evans, B. R. M. T. 53 G. 3.
per Le Blanc, J. and Lord Ellenborough, C. J. 16 East, 247.

Nisi for new trial in Exchequer, see 1 Price, 280. N. The rule was discharged.

² Levy v. Waterhouse, Devon Sum. 2 4 Camp. 40.
As. 1814. Gibbs, C. J. And on rule

(12) It is incumbent on common carriers to limit their responsibility by a notice given *by themselves*, that is, by advertisement in a newspaper, hand-bills, or a board placed in a conspicuous situation in the office appointed for the reception of the goods, with a proper notice painted or written on it, in large characters*. Where the carrier circulates hand-bills, he will be bound by their contents, and he cannot avail himself of the notice in the office, the terms of which vary from the hand-bills, and are more advantageous to himself†. Having taken this precaution, it will be left to the jury to presume that the owners of the goods have had notice of the advertisement, and consequently a personal communication of the terms of the notice in each particular case may be dispensed with. Where the notice is put on a board inlaid in the wall, an examined copy will be sufficient evidence‡. In cases where the carrier has not given a general notice in the manner above mentioned, he will not be permitted to avail himself of the general usage as it prevails among other carriers. See Lord Ellenborough's opinion on this subject in Clark v. Gray, 4 Esp. N. P. C. 178.

* See Butler v. Heane, 2 Camp. N. P. C. 415. and Clayton v. Hunt, 3 Camp. N. P. C. 27.

† Cobden v. Bolton, 2 Camp. N. P. C. 102.

‡ Ibid.

carrier might avail himself of his notice. N. The payment of the extra charge may be dispensed with, and if so, the notice will be unavailing^b.

In every contract for the carriage of goods^c, between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose of employment, for which he offers and holds it forth to the public^d. And the carrier or lighterman will be responsible for a breach of this implied undertaking, although he should give notice, "that he will not be answerable for any loss or damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he will pay 10*l.* per cent. on such loss or damage, so as the whole does not exceed the value of the vessel and freight;" because the object of such notice is to limit the responsibility of the carrier in those cases only, where *the law* would otherwise have made carriers answerable for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against. In *Ellis v. Turner*, 8 T. R. 531. where a similar notice was given, the owner of the vessel was holden liable for the whole loss upon the special undertaking of the master.

By stat. 7 G. 2. c. 15. s. 1. reciting, that it had been holden, that the owners of vessels were answerable for goods made away with by the masters or mariners, without the knowledge or privity of the owners, whereby merchants were discouraged from adventuring their fortunes as owners of vessels, to the prejudice of trade and navigation, it is enacted, that "the owners of vessels shall not be liable for any loss or damage, " by reason of any embezzlement, secreting, or making away " with (by the master or mariners) of any goods shipped on " board any vessel, or for any act, matter, or thing, damage^e " or forfeiture, done, occasioned, or incurred by the master or " mariners, or any of them, without the privity and know- " ledge of the owners, further than the value of the vessel " with her appurtenances and freight for the voyage, wherein " the embezzlement, &c. shall be made."

An action was brought against the owner of a vessel to recover the value of a quantity of dollars^e, shipped by the

^b *Wilson v. Freeman*, 2 Camp. N. P. C. 527.

^c *Lyon v. Mills*, 5 East's R. 428.

^d *Ib.*

^e *Sutton v. Mitchell*, 1 T. R. 19.

plaintiff on board the defendant's vessel, bound from London for Hamburg. The dollars had been taken during the night, by force, from on board the vessel, by a number of fresh water-pirates, as the vessel lay at anchor in the Thames. The defendant relied on the preceding statute, proving that one of the mariners was accessory in the robbery, by giving intelligence. The court of King's Bench were of opinion, that this case fell within the words, "any act, matter, or thing, done, occasioned, or incurred, by master or mariners, or any of them," and, consequently, that the defendant was not liable beyond the value of the vessel and freight.

The preceding statute afforded a very inadequate protection to the owners of vessels, for they still remained liable for the full amount of goods lost by robbery, embezzlement, &c. *to which the master or mariners were not privy*, and the case of a loss by fire was wholly unprovided for by that statute; to remedy these inconveniences, and for the further encouragement of trade and navigation, the statute 26 G. 3. c. 86. s. 1. has confined the liability of the owners of vessels for any loss or damage, by reason of any robbery, embezzlement, &c. without the privity of the owners, to the value of the vessel and freight, *although the master or mariners are not concerned in, or privy to, such robbery, embezzlement, &c.* The second section exempts the owners of vessels entirely from answering for any loss by fire. And by the third section, "the owners of vessels shall not be liable to answer for any loss happening to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time of shipping, insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature, quality, and value, of such gold, &c." The fourth section directs, that the freighters or proprietors shall receive satisfaction in average, in proportion to their respective losses, if the value of vessel and amount of freight shall not be sufficient to make them full compensation; and empowers the freighters or proprietors, or any of them, in behalf of himself and the other proprietors, or the owners of the vessel, to exhibit a bill in equity for the discovery of the amount of the losses, and also of the value of the vessel and freight, and for an equal distribution and payment thereof among the freighters in proportion to their losses; provided that, where the part-owners of the vessel exhibit the bill, they shall annex an affidavit, negating collusion with any of the defendants; and shall thereby offer to pay the value of the vessel and freight as the court shall direct, whereupon the

court shall ascertain the value, and direct payment thereof, as in the case of bills of interpleader.

The preceding statutes do not affect the liability of masters and mariners ^f.

By stat. 3 & 4 W. & M. c. 12. s. 24. "Justices of the peace of every county and place in England or Wales, are empowered at the next quarter or general sessions after Easter day, yearly, to assess and rate the prices of all land carriage of goods, brought into any place within their jurisdiction, by any common waggoner or carrier, and to certify the rates to the mayors and chief officers of the market towns within their jurisdiction, to be hung up in some public place; and waggoners or carriers taking more than the rate fixed, shall forfeit 5*l*. to be levied by distress and sale of goods, by warrant of two justices, where the waggoners or carriers reside." And by stat. 21 G. 2. c. 28. s. 3. reciting the preceding provision, and further, that no rates for the carriage of goods from distant parts of the kingdom to London, and places adjacent, had been yet settled, and that several common waggoners had thence taken occasion to enhance the price of carriage of goods to the prejudice of trade, it is enacted, "that every common waggoner or carrier, who shall demand and take any greater price for the bringing goods to London, or to any place within the bills of mortality, than is settled by the J. P. for the county or place whence such goods are brought, for the carrying goods from London to such county or place, shall for every such offence forfeit and pay 5*l*. to the use of the party grieved; to be recovered as by stat. 3 & 4 W. & M. or by distress and sale of goods, by warrant under the hands and seals of two J. P. for the counties of Middlesex, Surry, city of London, or Westminster; and the respective clerks of the peace are directed after Easter sessions, yearly, to certify to the Lord Mayor of London, and to the respective clerks of the peace for Middlesex, Surry, and Westminster, the rates so made; which certificate, or an attested copy thereof signed by the officer, to whom the same shall be so transmitted, shall be evidence of the rates and prices set for the carrying goods to any county or place."

A doubt is expressed in a note to *Kirkman v. Shawcross*, 6 T. R. 18. n. (a) whether the last-mentioned statute is not wholly repealed by stat. 7 Geo. 3. c. 40., but upon an examination of that statute, s. 60., it will be found that there is an express exception of what relates to the rate or price for carriage of goods. It seems, therefore, that the preceding clause is still in force.

^f See 7 G. 2. c. 17. s. 4. and 26 G. 3. c. 36. s. 5.

III. *Of the Lien of Carriers.*

By the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefore paid, by force of which he has a lien^g as far as the carriage price of the particular goods, but not to any greater extent. As of late years common carriers have on the one hand limited their responsibility by general notices, so on the other hand they have been attempting to extend their lien, so as to cover their general balances, or in other words, they have claimed a general lien. In a late case (*Rushforth v. Hadfield*, 6 East's R. 519. 7 East's R. 224.) it seems to have been admitted by the court, that the lien claimed by a carrier for his general balance, was not founded on the common law, but that such a lien might arise by contract between the owner of the goods and the carrier; and that usage of trade, if general, uniform, and long established, was evidence of such contract (13). But it was resolved, that, *as general liens were*

g *Skinner v. Upshaw*, Ld. Raym. 752.

(13) See *Naylor v. Mangles*, 1 Esp. N. P. C. 109. where it was contended, that a wharfinger had a lien for his general balance; Lord Kenyon, C. J. said, "that liens were either by common law, usage, or agreement. Liens by the common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of inn-keepers; that a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point, that wharfingers had the lien contended for." And in *Spears v. Hartly*, 3 Esp. N. P. C. 81. Lord Eldon, C. J. (on the authority of the preceding case) held, that a wharfinger had a lien for his general balance, and farther, that, although the balance was of more than six years standing, the wharfinger might retain the goods by virtue of his general lien, for the debt was not discharged by the operation of the Statute of Limitations, but the remedy only. See also *Aspinall*, assignee of *Howarth v. Pickford*, 3 Bos. & Pul. 44. n. (a) *Trover* for goods. The defence was, that the goods were put by Howarth into the hands of the defendant, as a carrier, to be forwarded from Manchester to his warehouse in London, and that the defendant was entitled to retain against the estate for the general balance due from H. for the carriage of

not to be favoured, the party who sets up such a claim ought to make out a very strong case, and evidence of a few recent instances of detainer by carriers, for their general balance, would not be sufficient to furnish an inference, that the party who dealt with a carrier, had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

It is to be observed, that liens at law exist only in cases where the party entitled to them has the possession of the goods; consequently, if a carrier parts with the possession of the goods, after the lien attaches, the lien is gone.

An usage for carriers to retain goods^b, as a lien for a general balance of account between them and the consignees, does not affect the right of the consignor to stop the goods *in transitu*.

A carrier^c who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has not any right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort, sent by the consignor.

IV. *By whom Actions against Common Carriers ought to be brought.*

In general the action against a carrier, for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation

^b *Oppenheim v. Russel*, 3 Bos. & 1 *Butler v. Woolcott*, 2 Bos. & Pul. Pul. 42. N. R. 61.

the goods. This right was established by evidence of the defendant having before claimed and been allowed to retain for his general balance, both against bankrupt estates and solvent customers, and also, by the evidence of a principal carrier on the western road to the same effect, respecting himself.

from the person by whom he has been injured^k. Hence where a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* by the seller) vests in the purchaser, he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser^l (14) as where he is^m; and it holds as well in the case of a carrier by water as where the goods are conveyed by land.

The plaintiff had shipped goodsⁿ on board the *Mercurius*, of which the defendant was owner, to be carried from London to Tonningen. The goods, (as appeared by an admission on the part of the plaintiff,) were expressed in the bills of lading, to be shipped by order and on account of Hesse and Co. of Hamburg. The ship arrived in the river Eyder, but was prevented from proceeding to Tonningen by the commander of one of his Majesty's frigates, and ordered to return home. After her return, the captain made an affidavit, that he believed the cargo to be Danish property; whereupon, the goods were unloaded and delivered over to the admiralty marshal, and labelled in the admiralty court: the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expenses incurred by the suit in the admiralty. On the part of the defendant it was insisted, that the goods being shipped by order, and on account, of Hesse and Co. the property vested in them immediately on their being shipped on board the *Mercurius*.

k *Dawes v. Peck*, 5 T. R. 330. 1 Atk. 248 S. P.
l *Dutton v. Solomonson*, 3 Bos. & Pul. 584.

m *Dawes v. Peck*, *supra*.
n *Brown v. Hodgson*, London Sittings, B. R. 2d March, 1809. 2 Camp. N. P. C. 30.

(14) Delivery of goods by the vendor, on behalf of the vendee, to a carrier, although not named by the vendee, is a delivery to the vendee. *Dutton v. Solomonson*, 3 Bos. & Pul. 582. And the goods are immediately upon the delivery to the carrier at the risk of the vendee, although the carrier is to be paid by the vendor. *King v. Meredith*, 2 Camp. N. P. C. 639. The vendor is not bound to enter and insure the goods with the carrier as above the limited value, without instructions for that purpose. *Cothay v. Tute*, 3 Camp. N. P. C. 129. But the delivery to the carrier ought to be in such a manner, as to furnish the purchaser with a remedy over against the carrier, in case of loss. *Buckman v. Levi*, 3 Camp. N. P. C. 414.

Dawes v. Peck, and *Dutton v. Solomonson*, were cited. It was also urged, that a recovery by the present plaintiff could not protect the defendant from an action at the suit of Hesse and Co. On the part of the plaintiff it was contended, that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea. That after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*: and it was admitted, that if the goods were directed to be sent by a carrier, without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that, in the case of goods sent abroad, if the goods arrived safe, they were to be paid for: aliter, if they do not arrive. Lord Ellenborough, C. J. "They are shipped by order, and on account, of Hesse and Co. I can recognize no property but that recognized by the bill of lading." Plaintiff nonsuited.

It is observable, that in the case of *Davis v. James*, 5 Burr. 2680, it was holden, that the *consignor* might maintain the action; but the ground of that decision was, that the consignor had made himself responsible to the carrier for the price of the carriage. In *Moore v. Wilson*, 1 T. R. 659, where the action was brought by the consignor, and the plaintiff having averred in his declaration, that the hire was to be paid by him, proof that the hire was to be paid by the consignee was holden not to be a variance, on the ground that whatever might be the contract, between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable.

Where goods were delivered to a carrier at Exeter to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was holden, that trover might be maintained against the carrier *at the suit of the consignor*°.

V. Of the Declaration.

FORMERLY the declaration in actions against common carriers stated their employment as common carriers^p, their

o *Tagliabue v. Wynn and another*, p *Herne's Plead.* 76. *Vid. Ent.* 37, 38. *Cornwall Lent. Ass* 1813. *Wood B.* 3155.

liability by the custom of the realm, a delivery to, and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but the modern practice is not to declare in this form, but in *assumpsit* (15), and not to state either the employment of the defendants as common carriers, or the custom of the realm (16) as to their liability. This form of declaration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, in which it was settled, that it did not make any difference, whether the plaintiff declared on the custom, or, more generally, in *assumpsit*; for, by stating that the defendant carried for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But although the plaintiff is

(15) It may be observed, however, that where the circumstances of the case require a count in *trover* to be added, the ancient form of declaration is adhered to, or (what is more usual) a concise form, analogous to the ancient form, and founded on a breach of duty, is adopted. It is worthy of remark, that Denison, J. said, in *Dale v. Hall*, B. R. II. 24 G. 2. MSS. that where the action was founded on the custom, it was *ex contractu*, and that *trover* and an action on the custom could not be joined; and in *Boson v. Sandford* and another, Salk. 440. the court held, that an action, charging* the defendants with a breach of their duty as carriers, was not an action *ex delicto*, but *ex quasi contractu*, and on this ground they decided, that the action being brought against two of four part-owners of a ship could not be sustained, although the defendants had not pleaded this matter in abatement, but had relied on the general issue, not guilty. This case, however, as to the taking advantage of the omission of some of the partners on the general issue, has been overruled in *Rice v. Shute*, 5 Burr. 2611, and in subsequent cases (see ante, p. 115, n. 64); and as to the form of the action, *Boson v. Sandford* was overruled in *Dickon v. Clifton*, 2 Wils. 319, which was recognized by Lord Ellenborough, C. J. delivering the judgment of the court in *Govett v. Radnidge*, 3 East's R. 62.

(16) "The custom of the realm is the law of the realm†, and consequently it need not be set forth in the declaration." Per Denison, J. in *Dale v. Hall*, MSS. and per Lord Hardwicke, C. J. in *Boucher v. Lawson*, Ca. temp. Hard. 199. See also Hargrave's Co. Litt. p. 89 a. n. 7. "It seems not only unnecessary, but even improper, to recite the custom in the declaration, because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading."

* See the declaration, 2 Show. 478. & Carth. 158.

† 1 Inst. 215. b. Hob. 78.

not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom^p.

The advantage resulting to the plaintiff from declaring in *assumpsit* is, that he may join the common counts with the special counts in *assumpsit*, if he has other causes of action to which they are applicable. The inconvenience which arises from declaring in *assumpsit* is, that it lets in a plea of abatement for want of joining all the parties, and it excludes the right to join a count in *trover*. If the plaintiff is desirous of avoiding this inconvenience, he may either pursue the ancient method of declaring with a recital of the custom, or he may adopt a more general form (omitting the recital of the custom) and allege his gravamen as consisting in a breach of duty arising out of an employment for hire, and may consider that breach of duty as a tortious negligence. Thus declaring in tort, the plaintiff will be permitted to add a count in *trover*, the defendant will be ousted of his plea in abatement^q, on the ground of not joining all the parties, and further, if the action is brought against several defendants, and some are found guilty, and others acquitted, the plaintiff will, notwithstanding, be entitled to judgment against those who have been found guilty^r.

The reader however, should be apprised, that the doctrine laid down in *Govett v. Radnidge* is opposed by two decisions in the court of Common Pleas, viz. first, by the case of *Powell v. Layton*, 2 Bos. & Pul. N. R. 365, in which it was determined, that a declaration against a carrier by water, stating "that he had received goods to carry for freight, but that he had not delivered them according to his duty," was founded in contract; and that to a declaration so framed, the defendant might plead that he was only liable jointly with his partners, and that his partners were not sued; and, secondly, by the case of *Max v. Roberts*, and eight others: there the gravamen was alleged as consisting in a breach of duty as ship-owners arising out of an employment for freight. The plaintiff could not prove all the defendants to be owners; the court were of opinion, that, as the action was founded in contract, it was incumbent on the plaintiff, to prove all the defendants to be owners, and having failed in that, he could not recover against those who were proved to be owners. A writ of error was brought, which, having been twice argued in the court of King's Bench, was

^p Per Lord Hardwicke, C. J. in *Boucher v. Lawson*, 11 G. C. B. R. Ca. temp. Hard. 199. ^r *Govett v. Radnidge*, B. R. 3 East's R. 69. *Cowper v. South*, 4 Taunt. 807.
^q *Mitchell v. Tarbutt*, 5 T. R. 649. ^s 3 N. R. 454.

adjourned to the Exchequer Chamber, as it was supposed that a decision in this case might settle and put at rest the question upon which the contrary judgments had been given; but after argument, the twelve judges were unanimously of opinion, that both the counts of the declaration were so defective in several material respects, (*perfectly collateral to the question upon which the determination of the judges was sought*) that no judgment could be given for the plaintiff upon either of them¹.

It will be proper to remark here, that *trover* will not lie against a common carrier for merely *losing* goods entrusted to his care, without any actual wrong² (17). The proper form of action is the action on the case before mentioned.

Although goods are spoiled by the default of the master of the ship, yet the owners are liable in respect of the freight³, if charged on the custom of the realm, or as usually carrying for hire, or upon an express undertaking; but not otherwise⁴. In this case the declaration (if in assumpsit) ought to be against all the owners; but if one or more are not named as defendants, advantage can be taken of the omission by plea in abatement only⁵. The same rule holds with respect to all common carriers who are partners, or who make a joint contract.

A ship was chartered to the commissioners of the navy as an armed vessel⁶, who put on board a commander in the navy

t Max v. Roberts, 12 East, 89. But see Weall v. King, 12 East, 452.

u Ross v. Johnson, 5 Burr. 9825. Kirkman v. Hargreaves, (case from Lancaster Sum. Ass. 1800, before Grahame, B.) B. R. H. 41 G. 3. MSS. S. P.

x Boson v. Sandford, Salk. 440. 3 Lev.

958. 1 Show. 29. 2 Show. 478. Skin. 278. 3 Mod. 321. Carth. 58. S. C.

y Boucher v. Lawson, Ca. temp. Hardw. 194.

z Rice v. Shute, 5 Burr. 2611.

a Fletcher v. Braddick, 3 Bos. & Pul. W. R. 192.

(17) But if the carrier has the goods in his custody at the time when he refuses to deliver them, this will be evidence of a conversion. Salk. 655. No *trover* will lie against a carrier who delivers goods to a wrong person through mistake. Per Kenyon, C. J. Yowl v. Harbottle, Peake's N. P. C. 49. The owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which the captain promised not to do, but afterwards delivered them to the wharfinger, conceiving that the wharfinger had a lien on the goods for wharfage fees; it was holden, that the owner might maintain *trover* against the captain, who could not prove that any wharfage duty was due.—Syeds v. Hay, 4 T. R. 260.

and a king's pilot, the master and crew being appointed and paid by the owners. In consequence of the improper execution of an order given by the commander, the chartered ship ran foul of another ship. It was holden, that the owners of the chartered ship were liable for the injury which the other ship sustained; for the chartered ship, notwithstanding it had an officer on board, was, with regard to third persons, to be considered as the ship of the owners.

A notice by a carrier limiting his responsibility to a certain sum^b, unless goods above that value are entered and paid for accordingly, amounts only to a limitation of damages, after a right to them has accrued by a breach of the contract, and is matter proper to be given in evidence to the jury in reduction of damages, but forms no part or qualification of the original contract for carriage, and, consequently, is not necessary to be shewn to the court in the first instance on the face of the record. Hence, in a case of this kind, a declaration in the usual form^c is sufficient.

VI. Of Payment of Money into Court.

In an action of assumpsit against a carrier^d, to recover the loss sustained upon goods which had been put on board the defendant's barge, and which had been spoiled in consequence of the cargo being sunk, the defendant was not allowed to pay the invoice price into court, the rule being^e, that money cannot be paid into court in cases of uncertain damages.

In assumpsit against a common carrier for losing a trunk belonging to the plaintiff^f, of the value of 50*l.* the defendant moved for leave to pay 20*l.* into court, upon an affidavit, stating that he had published an advertisement that he would not be answerable for any parcels above the value of 20*l.* unless he was paid in proportion to the risk, and that, in the present case, the parcel exceeded that value, yet the defendant had not been paid any thing extra for the carriage. The court of King's Bench permitted the money to be paid into court, observing, that, as the declaration did not state any damage independently of the loss, the plaintiff could not re-

^b *Clarke v. Gray*, 6 East's R. 564.

^c S. C.

^d *Fail v. Pickford*, 2 Eos. & Pul. 234.

^e *Tidd's Pract.* 2d edit. p. 537.

^f *Hutton v. Bolton*, 1 H. Bl. 299. n. (b.)

cover beyond the value of the goods; for which reason the declaration did not differ from the common case of goods sold and delivered.

In the preceding case the consequences of paying money into court were not attended to; but, in a subsequent case of *Yate v. Willan*, 2 East's R. 128, where in assumpsit by the owner of a trunk of the value of 15*l.* which had been lost by the defendant, the declaration stated a general undertaking by the defendant to carry goods safely for hire, and the defendant paid 5*l.* into court; it was holden that the defendant could not give in evidence a notice "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked, and paid for according to the value," and that the trunk in question had not been so paid for; because the payment of money into court, upon a count stating a special contract, was an admission of such contract, and narrowed the inquiry to the quantum of damages sustained by the breach thereof (18).

VII. *Evidence.*

ASSUMPSIT against the defendant ^g (a keelman) as a common carrier, for damage done to goods delivered to his custody for safe carriage. On *non assumpsit*, the plaintiff proved the damage by water in the hold of the vessel. The judge permitted the defendant to produce evidence to show, that there had not been any negligence on his part. On a motion for a new trial, it was insisted, that the evidence given for the defendant ought not to have been received. The court were of opinion, that this evidence was not admissible; Lee, C. J. observing, that goods delivered to common carriers were to

^g *Dale v. Hall*, B. R. 1 Wils. 281. and MSS.

* (18) The authority of this case has been shaken in *Clark v. Gray*, 6 East's R. 570, in which Lord Ellenborough, delivering the judgment of the court, said, "that the case of *Yate v. Willan*, could not be supported in its full extent; for although the payment of money did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss."

be kept safely, except against acts of God or king's enemies; that all other excuses amounted to negligence, and, not being legal excuses, evidence of them was immaterial, as not being any answer to the undertaking.

In an action against the owner of a vessel^b, for not safely carrying the goods of the plaintiff, the plaintiff called the master of the vessel, whom he had released, as a witness to prove his case; Lord Kenyon, C. J. admitted him, observing, that the master had not any immediate interest; that the record in this cause would not be evidence for or against him in an action brought against him; and although it should appear, that the vessel was lost through the negligence of the witness, yet the present defendant was liable to the plaintiff; consequently, taking it either way, he was a good witness,

A book-keeper to a carrier is a good witness for him, of necessity, without a release^c.

^b *Lay v. Hollock*, Peake's N. P. C. 101. ^c *Spencer v. Goulding*, Peake's N. P. C. 109.

CHAP XI.

COMMON.

- I. *Of Right of Common.*
- II. *Of Common of Pasture, and herein of Common appendant, Common appurtenant, and Common in gross.*
- III. *Of the Interest of the Owner of the Soil subject to Right of Common; and herein of Improvement and Inclosure.*
- IV. *Of the Remedy for Disturbance of Right of Common.*
- V. *Of Surcharges by Commoners.*
- VI. *Evidence.*

I. *Of Right of Common.*

RIGHT of Common is an incorporeal hereditament, or a right (lying in grant) which **certain** persons have to take or use in common, a part of the natural produce of land (1), water (2), wood (3), &c. belonging to other persons, who have the permanent or limited interest in the soil, &c.

If a person claim by *prescription* any species of common in the land of another, and that the owner shall be excluded to have pasture, estovers, or the like, this is a prescription against law^a. But a person may prescribe for the *several*

^a 1 Inst. 122 a.

(1) Common of pasture, and common of turbary.

(2) Common of fishery.

(3) Common of estovers.

pasture, and exclude the owner of the soil from feeding his cattle there^b.

A person may have two distinct substantial grants of rights of common over different wastes, from *different lords*, in respect of the *same tenement*^c; and immemorial usage is evidence of such distinct grants.

If A. has a common by prescription^d, and takes a lease of the land for twenty years, whereby the common is suspended; after the years ended, A. may claim the common generally by prescription; for the suspension was to the possession only, and not to the right, and the inheritance of the common did always remain (4).

II. Of Common of Pasture; and herein of Common appendant, Common appurtenant, and Common in gross.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle, the herbage growing on land of which some other person is the owner.

Common of pasture is either common appendant, common appurtenant, or common in gross.

With respect to two other kinds of common of pasture, which are sometimes mentioned in the books, viz. common of vicinage, and common in gross *sans nombre*, or without stint; it may be observed, that the former cannot, strictly speaking, be a *right of common*^e, for if it were, it would prevent an inclosure, which it has been always holden that

b 1 Inst 122. a. *Hobkins v. Robins*, d 1 Inst 114 b.

2 Saund. 324.

c *Hollinshead v. Walton*, 7 East, 485.

e *Musgrave v. Cave*, Willes, 322.

1 Inst 122 a

(4) Title once gained by prescription or custom, cannot be lost by interruption of the possession for 10 or 20 years; but by interruption in the right it may; as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate, is an interruption in the right. 1 Inst. 114. b. When a prescription or custom makes a title of inheritance, the party cannot alter or waive the same in pais.

it will not: the truth is, it is only an excuse for a trespass. Where there is a partial inclosure^f, common by vicinage still continues. As to common in gross *sans nombre*, it has been truly said, that the notion of this species of common, in the latitude in which it was formerly understood, has been exploded long ago^g (5), and it cannot have any rational meaning, but in contradistinction to stinted common, where a man has a right to put on the common a certain number of cattle only.

Common appendant^h is of common right (and therefore a man need not prescribe for itⁱ) (6), for beasts commonable, that is, that serve for the maintenance of the plough, as horse and oxen, and for kine and sheep to manure the land, and is appendant to *ancient arable land* only^k. It must have existed from time immemorial^l. It must be claimed in the waste of the lord, not for a certain number of cattle, but for such only as are levant and couchant on the land, and therefore it cannot be severed, not even for a moment, nor turned into common in gross. The reason for common appendant appears to be this; that as the tenant would necessarily have occasion for cattle^m, not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in, while the corn is growing on his own arable land; and therefore of right (if the lord had any waste) the tenant might put his cattle there, when they could not go on his own arable land; hence it is plain, that levancy and couchancy (7) are incident to common appendantⁿ, namely, that

f Gullett v. Lopes, 13 East, 348.

g Bennett v. Reeve, Willes, 232.

h 1 Inst. 122 a. Bro. Abr. Comon. 1.

i Bro. Abr. Comon. pl. 11. 35.

k 4 Rep. 37 b. Willes, 322.

l 26 H. 4. a.

m Bennett v. Reeve, Willes, 231.

n 1 Roll. Abr. 398. l. 1.

(5) In Mellor v. Spateinan, 1 Saund. p. 346. c. Serj. Wms. edition, Kelynge, C. J. said positively, that there could not be any common in gross *sans nombre*. See also Benson v. Chester, 8 T. R. 306. where it was holden, that a claim of a right of common, without stint, as annexed to an ancient messuage, without land, could not be supported, such a right of common not existing in law.

(6) Common appendant must have existed from time immemorial, but it bught not to be claimed by prescription. The proper way of pleading it is, that the party was seized in fee of certain arable land, to which he had common appendant in the locus. See 4 H. 6. 13. a.

(7) Levancy and couchancy means the possession of such land as will keep the cattle claimed to be commoned during the winter

the tenant can only have a right of common for such cattle as are levant and couchant on his estate, that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof (8).

Common appendant being of common right, may be apportioned, by alienation of part of the land to which the common is appendant^o; and, if the land be divided ever so often^p, each parcel of land is entitled to common appendant.

Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned^q, because common appendant is of common right^r; but otherwise it is of common appurtenant^s.

Common appurtenant is a right of common founded on a grant^t, or prescription^u, (which supposes a grant) annexed to the enjoyment of land. This species of common may be granted for all manner of cattle, that is, not only for those which serve for the maintenance of the plough, and to manure the land, but for swine, goats, and the like^x; it may be granted for an unlimited number, or for a certain number of cattle. Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have, is, as in the case of common appendant, levancy and couchancy^y; and, consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common appurtenant for a certain number of cattle may be granted over, and so become common in gross.

Common appurtenant may be granted at this day^z: and may be apportioned^a by a conveyance of part of the land to which the right is appurtenant (9).

o 1 Inst. 122 a.

p Per Willes, C. J. Willes, 230, 231.

q 2 Rep. 79 a.

r 1 Inst. 122 a.

s Ib.

t Cro. Car. 452.

u 1 Inst. 122 a.

x 1 Inst. 122 a.

y 1 Rot. Abr. 398. (1) pl. 1. Dairy v. Kent, Cro Jac 1.

z Cowlam v Slack, 15 East, 108.

a Adjudged, Hob 25 1 Inst. 122 a.

and as many as the land will maintain during the winter, shall be said to be levant and couchant. Per Buller, J. in Scholes v. Hargreaves, 5 T. R. 48, 49. But see Rogers v. Benstead, post tit. Evidence.

(8) "It is plain that a person cannot have a right of common appendant for cattle which he borrows, unless he make use of them all the year to plough or manure his land." Per Willes, C. J. in Bennett v. Reeve, Willes, 231, 2.

(9) This point was determined also in Sacheverill v. Porter, Cro.

Common appurtenant, as well as common appendant, may become extinct by unity of possession^b.

To an action of trespass defendant pleaded a prescriptive right of common for all his cattle, *levant and couchant*, upon a messuage, *cum pertinentiis*^c: on demurrer, it was insisted, that the prescription was not good, for the cattle could not be *levant and couchant* on a messuage. Holt, in support of the plea, contended, that a messuage comprehended a curtilage, which might be an acre or more, upon which the cattle might be *levant and couchant*: the court being of this opinion, adjudged the prescription to be good.

In an action on the case for disturbing the plaintiff's right of common^d, it appeared, that the plaintiff (who claimed the common in respect of a messuage for all commonable cattle, *levant and couchant*) was the owner of a small house wherein he carried on the trade of a butcher. The house had neither land, curtilage, nor stable belonging to it, but under the shop window was a sheep-hold, which would contain four or five sheep at a time, but neither horse nor bullock could be kept there: Lord Kenyon, C. J. at the trial, on the northern circuit, being of opinion that levancy and couchancy was not proved, as the plaintiff had not shewn that he was in possession of land whereon the cattle might be *levant and couchant*, nonsuited the plaintiff. The court of B. R. afterwards concurred in opinion with the chief justice.

Common of pasture, without land, for a certain number of sheep, may be parcel of a manor^e, and demised and demisable by copy of court roll: and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant; for, not being claimed as incident to arable land, but to the manor, for a certain number of sheep in the soil of another, it cannot be common appen-

b Bradshaw v. Fyre, Cro. Eliz. 570.

d Scholes v. Hargreaves, 5 T. R. 46.

e Scumler v. Johnson, T. Jon. 237.

e Musgrave v. Cave, Willes, 319.

g Show. 248. S. C.

Car. 142. where a right of common in a waste, ~~was granted~~ granted to A., (who was seised of lands in S.) and all his tenants in S. for all commonable cattle, and A. conveyed parcel of the lands in S.; it was holden, that the alienee was entitled to common for all his commonable cattle, *levant and couchant*, on the parcel of the lands conveyed.

dant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor; then it must be common appurtenant, the only remaining sort of common.

Common in gross is so called^f, because it does not appertain to any land, and it must be by grant or prescription.— This species of common may be granted for all manner of cattle, and for an unlimited number, or for a certain number of cattle. If granted for an unlimited number, it seems that the grantee may put on any number of cattle, provided he leaves sufficient common for the lord; if granted for a certain number, the enjoyment of the right is of course limited by the number specified in the grant. A corporation may prescribe for common in gross, for cattle *levant and couchant*, within the town, but not for common in gross *sans nombre*^g. A right of common in gross is a tenement^h within the stat. 13 & 14 Car. 2. c. 12, s. 1.

A copyholder who has common in a waste, without the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate, and must prescribe in a *que estate* through his lord, for him and all his customary tenants thereof. And such common without the manor is not extinct by enfranchisement of the copyhold, though there be no words of re-grant. And after enfranchisement, the feoffee must prescribe in a *que estate* of his lord for himself and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs as *incumbent* to the enfranchised tenementⁱ.

^f 1 Inst. 122 a.

^g Mellor v. Spateman, 1 Saund. 343.

^h R. v. Dertingham, 7 T. R. 671.

ⁱ Barwick v. Matthews, 5 Taunt. 265.

III. *Of the Interest of the Owner of the Soil subject to Right of Common; and herein of Approvement and Inclosure.*

In land subject to a right of common, the right of the lord or owner of the soil (10) ought to be so exercised as not to injure the right of common. But the right of the commoners may be subservient to the right of the lord in the soil^k, so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if it can be proved that such a right has been constantly exercised by the lord. So the lord may^l, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. The immemorial exercise of such right by the lord is evidence, that he reserved that right to himself, when he granted the right of common to the commoners.

In like manner, there may be a valid custom in a manor, within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights^m.

If a commoner, having a right of common for one beast, put on twoⁿ, the lord can only distrain the one put on last, unless they were both put on together; and it must be shewn in a plea (justifying the taking as a surcharge) whether they

^k *Bateman v. Green*, 5 T. R. 411.

^m *Boulcott v. Winnill*, 2 Camp. N. P.

^l *Fulkard v. Hemmett*, 5 T. R. 417.

C. 261.

ⁿ (a.)

ⁿ *Ellis v. Rowles*, Willes, 633.

(10) The customary tenants of a manor may allege a custom to have the sole and several pasture in the soil of the lord for *the whole year*, and thereby exclude the lord. *Hoskins v. Robins*, 2 Saund. 324. But even in this case the lord may distrain, for *other damage* in his soil, the cattle of any who have no right to put in their cattle although he has not any interest in the soil. Per Hale, C. J. S. C. for he has an interest in the *mines, trees, bushes, &c.* Per Cur. 1 Vent. 164.

were put on together or separately, and if the latter, which was put on first (11).

By stat. 20 H. 3. c. 1. ° lords of woods, wastes, and pastures, in which then tenants have common of pasture, may approve such wastes, &c provided sufficient pasture, with a sufficient ingress and egress, is left to the tenants.

If the lord make a scoffment of the waste, &c. the scoffee may approve, leaving a sufficiency of common; and this rule holds, although the lord continues seized of the manor within which the waste lies for though in the statutes of Merton and Westminster the lord only is mentioned, yet as in those days statutes were not drawn with that fulness of expression which they are at the present time, the term, "lord of the manor," must be considered as equivalent to "owner of the soil," when they stand in the same predicament. It is not necessary, therefore, that the person approving should be lord of the manor^a, a seisin in fee of the waste, &c. is sufficient. It is worthy of remark, that the statute of Merton does not empower the lord to approve against any other right of common^b, except 'that of common of pasture, appendant or appurtenant. It does not extend to common in gross^c, the words of the statute being *quodcumque pertinet ad tenementa sua*, nor to common of piscary, of turbary^d, estovers, and

^a Extended by stat. 17 Edw. 1. tit. 1. p. Glover v. Lane, 3 T. R. 445.
^b c. 36. to improvements by lords. q. 2 Inst. 87.
 against their neighbours—Confirm. r. 2 Inst. 86.
^c ed by stat. 18. 4 Edw. 6. c. 1. See a. Grady v. Gunner, 1 Phulst 415.
^d also tit. 29 G. 2. c. 6. amended by
 stat. 31 G. 2. c. 31.

(11) In replevin for taking the plaintiff's sheep on Whitmanslie Down, the defendant avowed taking the cattle doing damage to his right of common; the plaintiff in his plea in bar claimed a right of common for himself as tenant of eight acres of land, for two sheep for every acre; the defendant (admitting the right of common claimed by the plaintiff) replied, that, at the time of the distress, the plaintiff had sixteen sheep on the common, over and above the sixteen that were distrained; that the defendant left the first mentioned sixteen to use the common, and only distrained the supernumerary sixteen, with which the plaintiff had overcharged it of his own wrong, which were doing damage to the plaintiff. It does not appear that in this case any objection was made to the replication, for not stating, whether the thirty-two sheep were put on together, or separately. Indeed the only question made was, whether one commoner could distrain the cattle of another commoner, who had surcharged the common, which was determined in the negative; and the plaintiff had judgment? Hall v. Harding and others, B. R. E. 9 Geo. 3. 4 Burr. 2426. 1 BL R. 673. S. C.

the like, the words used throughout the statute being *pastura et communia pasturæ*^t. But though the lord cannot approve against common of turbary, yet where there is common of pasture, and common of turbary in the same waste^u, the common of turbary will not prevent the lord from justifying an inclosure against the common of pasture, if he leaves sufficient; for they are two distinct rights, and the concurrence of these rights in one person will not make any difference. In like manner the lord of the manor^v, or his grantee, may justify an approvement or inclosure against tenants having common of pasture, although they have a further right of digging sand, &c. if sufficient common of pasture be left. It is, however observable^w, that if the inclosure operates as an injury to the other rights, the commoner will be entitled to an action on the case for such injury.

By the approvement of part, agreeably to the rule laid down in the statute of Merton, that part is discharged of the common, insomuch, that if the tenant, who has the common, purchases that part, his common is not extinguished in the residue^x.

If the lord incloses any part, and does not leave sufficient common in the residue, the commoner may break down the whole inclosure^y.

If the common has been inclosed 20 years, the commoner cannot make an entry, but must bring an assize of common^z.

IV. *Of the Remedy for Disturbance of Right of Common.*

WHATEVER destroys the right of common is a nuisance^t, and may be abated by the commoner, provided it can be done without interfering with the lord's right to, or interest in the soil. But if the nuisance cannot be abated, without such interference, the commoner must resort to his action on the case, and have satisfaction in damages. If the right of common be partially injured, the commoner ought not to abate the cause of such injury, more especially if in so

^t 2 Inst. 37.

^u *Fawcett v. Strickland*, Wilks, 37. Com. Rep. 578. S. C.

^v *Shakespeare v. Peppin*, 6 T. R. 741.

^y Agreed in *Fawcett v. Strickland*, Wilks, 37.

^z 2 Inst. 37.

^a 2 Inst. 38.

^b *Crouch v. Wilmet*, Derby Summ. Ass. 1732, cited by Lawrence, J. in *Hawks v. Baron*, 2 Taunt. 160.

^c 2 Inst. 38.

doing he must necessarily interfere with the right to the soil. On this principle it was holden in *Cooper v. Marshall*, 1 Burr, 265., that a commoner could not justify digging up the soil and destroying the coney-burrows erected in the common by the lord, who was entitled to free warren there. So where the lord had planted trees on the common, and the commoner cut them down^d, it was holden that the lord might maintain trespass, and that the commoner could not justify the abatement of the trees.

The usual remedy adopted by commoners is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or the owner of the soil^e, a stranger or a commoner. If the action is brought against a wrong doer^f, title being only inducement, it is not necessary to set it forth; it will be sufficient for the plaintiff to state in his declaration, that he was possessed of a certain quantity of land, &c. and by reason of such possession was entitled to the right, in the exercise of which he was disturbed.

In this action the plaintiff must prove an injury sustained, but any injury in the minutest degree is sufficient^g; e. g. the taking away the manure which has been dropped on the common by the cattle, although the proportion of the damage sustained by the plaintiff be found to amount to a farthing only^h; for, if, where the injury was small, a commoner could not maintain an action, a mere wrong doer might by repeated torts in course of time establish evidenceⁱ of a right of common.

If, to an action on the case by a commoner for injuring his right of common^k, the defendant plead, that he dug turves under a licence from the lord, he should add, that "sufficient common was left for the commoner;" and if he do not, the plaintiff is not obliged to reply, that there was not sufficient common left; because it is the gist of the action, and set forth in the declaration.

^d Kirby v. Sadgrove, 6 T. R. 483. B. R. confirmed in error in Exchequer Cha. 1 Bos. & Pul 13.

^e Hassard v. Cantrell, Lutw. 101.

^f Strove v. Byrt, 4 Mod. 418. See also Greenhow v. Halsey, Willes, 621.

^g Per Lord Ellenborough, C. J. Lidgold v. Butler, Middlesex Sitting after Trin. 45 G. 3 B. R. MSS.

^h Pindar v. Wadsworth, 2 East's R. 154.

ⁱ See Patrick v. Greenway, 1 Wms. Saunders, p. 346. b. n. (2).

^k Greenhow v. Halsey, Willes, 619.

V. Of Surcharges by Commoners.

FORMERLY, if one of the commoners had surcharged the common¹, that is, had put more cattle into the common than he was entitled to, the commoner who was aggrieved might sue out a writ of admeasurement of pasture, and by that suit the common was admeasured in respect of all the commoners, as well those who had not surcharged, as those who had surcharged it, and the person who brought the action. An action on the case has been substituted in the place of this writ of admeasurement, as a more easy and speedy remedy; and it has been holden, that this action may be maintained by one commoner against another for a surcharge^m, although the plaintiff himself has been guilty of a surcharge. In the declaration it is not necessary for the plaintiff to set forth the defendant's right of common, and shew in what manner he has exceeded that rightⁿ, by putting in a greater number or an improper species of cattle; but the disturbance may be alleged generally (12) thus, "that the defendant wrongfully and injuriously ate up and depastured the grass on the common with divers sheep and lambs, to wit, 200 sheep and 200 lambs." Neither is it necessary that the plaintiff should state that he was exercising his right of common at the time of the surcharge^o.

VI. Evidence.

IN replevin defendant avowed taking the cattle damage feasant^p, plaintiff prescribed for common in the locus in quo as appurtenant to his messuage. The plaintiff produced as a witness a person who claimed common in the same place.

¹ F. N. B. 325. B.

^m Holman v. Todd, 4 T. R. 71.

ⁿ Atkinson v. Tensdale, 3 Wils. 278.

^o Bl. R. 317. S. C.

^p Wells v. Watling, 2 Bl. R. 1233.

^p Harvey v. Collinson, Norfolk Sum. Ass. 1727. MSS. Serjt. Leed's.

(12) It seems from *Smith v. Feverel*, 2 Mod. 6. and from a dictum of the court in *Hussard v. Cantrell*, Lutw. 107. that in an action against the lord, it is necessary to shew a particular surcharge.

His testimony being objected to, Raymond, C. J. overruled the objection, observing that where a person prescribes for common, not as appendant to his messuage, but by virtue of a custom within a parish or manor, and the custom is in issue, there a person within the manor or parish claiming common is interested, and cannot be a witness: but where a person prescribes for common, for all cattle levant and couchant on his messuage, as belonging to that messuage, there is nothing but that person's particular right of common in question, as belonging to that particular messuage; and another person who claims common in the same place by virtue of another messuage, may be a witness, because not interested in the present question.

Trespass for entering plaintiff's close with cows and sheep, and destroying his grass^q. As to sheep, plea not guilty, and issue thereon. As to cows, defendant justified, and prescribed for common, for all cattle (except sheep) *levant and couchant* on defendant's messuage, and one acre of land; the issue was on the levancy and couchancy.

The evidence on the first issue was, that defendant's sheep were seen at several times depasturing in *locus in quo*, and that at such time the defendant's shepherd was with them.

Mr. Gatward, (recorder of Cambridge) for the defendant, insisted, that as it did not appear that defendant had knowledge or consented, that his sheep should feed there, and had a servant to take care of them, the shepherd, and not the defendant, was the trespasser, and that the action could not be maintained against the master^r.

Per Lord Raymond, C. J. "The action lies against the master, his sheep did the trespass; he has his remedy against the servant."

As to the second issue, the evidence was, that defendant was seized of a copyhold messuage, and one acre of pasture land, that he foldered eight or nine cows in the yard of the said messuage with hay brought from another farm about two miles off.

Lord Raymond, C. J. "These cows cannot be levant and couchant upon the one acre; for I am clear that levancy and couchancy is a *stint of common in contradistinction to common sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain; and it was so resolved in the case of the town of Derby^s. I know there are cases

^q Rogers v. Benstead, Cambr. Sum. r 2 R. A.

Am. 1727. cor. Ld Raymond, C. J. s Mellor v. Spateman, 1 Saund. 343.

MSS. Serjt. Leed's.

1 Mod. 7.

which say, that foddering in a yard makes levancy and couchancy, but then the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he fodders them in the yard with the produce of other land; for, by the same rule, he might put 1000 of his own, or of other persons, and deprive the other commoners of the benefit of common."

* Trespass for impounding plaintiff's colt and three fillies. Defendant sets out his right to a messuage with the appurtenants, to which the defendant has a right of common belonging in the *loc. in quo*, and that defendant took the cattle damage feasant. Plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *loc. in quo*, for all commonable cattle, levant and couchant, on the said messuage, at all times of the year. Defendant *protestando*, that plaintiff has not such right, traverses the levancy and couchancy of the beasts taken, and issues thereon. Per Lee, C. J. "The *protestando* is not part of the issue, and need not be proved." It appearing by the evidence, that the messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him. Per Lee, C. J. "These beasts cannot be levant and couchant on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage, and so it was determined by Lord Raymond in *Rogers v. Benstead* at Cambr. 1727, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only." Lord Raymond, in the above case, cited 1 Vent. —. The foddering cattle in a yard is said to be evidence of levancy and couchancy, Salk. 169; but it must be foddering with the produce of the ground belonging to the messuage. Plaintiff non-suited. N. There may be common appurtenant to a messuage with appurtenants; but not to a messuage only.

In replevin the plaintiff prescribed for common for horses by reason of his messuage. The evidence was of a right of

common for horses and sheep. Raymond, C. J. "It has been adjudged, that in replevin this is no variance from the prescription; for the prescription for a common for horses and sheep is a justification of common for the cattle taken." So evidence of a right of common for sheep and cows will support a plea prescribing for common for sheep*.

In an action on the case against defendant, plaintiff declared⁷, that he was possessed of a messuage to which a right of common for all commonable cattle was appurtenant, and that defendant put his cattle on the said common, and also dug up part of it; *per quod*, the plaintiff could not enjoy his common *in tam amplo modo*, as by law he might. As to putting in his cattle, plea, not guilty; and, as to digging up the common, justification, that it was to make a watering place necessary for drink for the cattle on the common. On the first issue, it was insisted, for the plaintiff, that the defendant could not give in evidence his right of common, on Lord Holt's opinion in Salk. But, *per Pengelly, C. B.* "In trespass *ri et armis* the only evidence of defendant, on not guilty, is, that he did not come on the ground, and a right to do so must be pleaded. But here the whole declaration is in issue, and so the *per quod* he could not enjoy *in tam amplo modo*, as of right he ought, is part of the issue; and if defendant proves that he has a right, then, notwithstanding the plaintiff's complaint, he does enjoy, &c. as of right he ought. This point was settled by the Court of C. B. in a case I argued, which came before the court on a motion for a new trial, in a cause tried at Cambridge before the present Lord Chf. King, when C. J. of C. B. who had ruled that the defendant could not give in evidence his right of common; and on a motion for a new trial, Tracey, J. seemed surprised at it; and it was ruled otherwise by the court, and a new trial granted."

x Bridges v. Saer, 4 Mod. 89.

y Bennett v. Spinks, Norfolk Sum. Ass. 3 G. 2. Serjt. Leach, M8.

C H A P. XII.

CONSEQUENTIAL DAMAGES.

Of Actions on the Case for consequential Damages, and herein of the general Rule for distinguishing Actions of Trespass vi et armis from Actions of Trespass on the Case.

A QUESTION frequently arises respecting the form of action, which should be adopted by a person who has sustained an injury; that is, whether the proper remedy is by action of trespass *vi et armis*, or trespass on the case: and as, in order to avoid confusion, the judges have at all times been anxious that the boundaries of actions should be preserved^a, it may be proper to remark, that the true distinction, (and which seems to be now settled^b), is, that *if the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, trespass vi et armis is the proper remedy; (1) but where the injury is not direct and immediate on the act done, but consequential only, there the remedy is by action on the case*^c, sometimes termed an action on the case for consequential damages.

The following case will illustrate the rule here laid down:

On the evening of the fair day at Milborn Port in Somers-

a 3 Wils. 411. 1 Bos. & Pul. 476.

b *Leame v. Bray*, 3 East's R. 593.

c *Reynolds v. Clark*, Lord Raym. 1399.
Str. 634. S. C. See also *Morgan v.*

Hughes, 2 T. R. 231. and *Kenyon C. J. in Day v. Edwards*, 5 T. R. 649. S. P. and in *Ogle v. Barnes*, 2 T. R. 190, 1.

(1) "Looking into all the cases from the year book in the 21 H. 7. ~~21~~ a. down to the latest decisions on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable in trespass." Per *Gröce, J.* in *Leame v. Bray*, 3 East's R. 600.

celebrated, the defendant threw a lighted squib from the street into the market-house; the squib fell upon the stall or standing of B.; C. in order to protect himself and the wares of B. from injury, took up the squib, and threw it across the market-house, when it fell upon the standing of D., who to save his wares, threw the squib to another part of the market-house; the squib struck the plaintiff in the face, when the combustible matter bursting, put out one of his eyes; an action of trespass, *vi et armis*, having been brought, it was urged, on the part of the defendant, that it would not lie, and that the proper remedy was an action on the case; a verdict was found for the plaintiff, subject to the opinion of the court, as to the form of the action (2). Nares, J. was of opinion that trespass, *vi et armis*, was the proper form of action, the act being illegal at common law from the probable consequence of injury resulting from it, and by stat. 9 & 10 W. 3. c. 7. as a nuisance. Blackstone, J. was of a different opinion, conceiving that the lawfulness or unlawfulness of the original act was not the true criterion (3); that the settled distinction was, that where the injury was immediate, trespass *vi et armis* would lie; where consequential only, it must be an action on the case. In the present case the original act was against B. a trespass, not as against C. or the plaintiff. The tortious act was complete when the squib lay at rest upon B.'s stall; B., or any by-stander, had a right to protect himself by

d Scott v. Shepherd, 2 Bl. R. 592. 3 Wils. 403. 8. C.

(2) I have stated this case very fully on account of the important doctrine contained in the arguments of the judges, more especially in that of Blackstone, J. which is frequently cited on this subject. With respect to the decision of the court in Scott v. Shepherd, it is to be observed, that Lord Ellenborough, C. J. (in Leame v. Bray, 3 East's R. 596.) said, that it went to the limit of the law.

(3) So Lawrence, J. "In actions of trespass the distinction has not turned either on the lawfulness of the act, whence the injury happened, or the design of the party doing it to commit an injury; but, as mentioned by Blackstone, J. in the case of Scott v. Shepherd, on the difference between injuries direct and immediate, or mediate and consequential; in the one instance the remedy is by trespass, in the other by case." 3 East, 601. "If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass." Per Lawrence, J. 3 East, 597. "Where a man shoots an arrow at a mark and wounds another, although it be against his will, he shall be called a trespasser." Per Read, C. J. of the Common Pleas, 91 H. 7. 28. a.

removing the squib, but should have taken care to do so in such a manner as not to enlamege others. He added, that this was not like the case of diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree, because in those cases the original motion, the *vis impressa*, was continued, though diverted; but here the instrument of mischief was at rest, until a new impetus and a new direction was given to it, not once only but by two rational agents successively; that, in strictness of law, trespass *vi et armis* would lie against D. the immediate actor; for inevitable necessity only would excuse a trespass, and D. had exceeded the bounds of self-defence, and had not used sufficient circumspection in the act of removing the danger from himself; throwing the squib *across* the market-house, instead of brushing it down or throwing it out of the open sides into the street, was an unnecessary and incautious act. Gould, J. was of opinion that trespass *vi et armis* was maintainable, that the defendant might be considered in the same light as if he had thrown the squib in the plaintiff's face. The terror impressed on C. and D. excited self-defence, and deprived them of the power of recollection; what they did was therefore the inevitable consequence of the defendant's unlawful act; they acted from necessity, and the defendant imposed that necessity on them. De Grey, C. J. was of the same opinion, agreeing with Blackstone, J. as to the principles he had laid down, but differing from him in the application of those principles to the present case. The question was whether the injury was received by the plaintiff *by force* from the defendant, or whether the injury resulted from a new force of another. He considered that was done, subsequently to the original throwing, as a continuation of the first force, and the first act, which would continue until the squib was spent by bursting. Any innocent person was justifiable in removing the danger from himself to another; the blame lighted on the first thrower; the new direction and new force flowed out of the first force, and was not a new trespass; C. and D. were not free agents, but acting under a compulsive necessity for their own safety and self-preservation. The several acts of throwing the squib must be considered as one single act, namely, the act of the defendant; the same as if it had been a cracker which had bounded and rebounded again and again before it struck out the plaintiff's eye.

The distinction between trespass *vi et armis*, and trespass on the case, may be further illustrated by the example usually

q. Per Fortescue, J. 1 Str. 638. cited by Kenyon C. J. in Day v. Edwards,

5 T. R. 649. Per Le Blanc, J. in Leame v. Bray, 3 East's R. 602.

part of a man's throwing a log into the common high-way ; if at the time of the log being thrown it should strike any person, such person may maintain trespass *vi et armis* ; but, if, after it is thrown, and is lodged on the ground, any person passing along the highway, should receive any injury by falling against or over it, there the remedy is by action on the case.

The defendant driving his carriage on the wrong side of a road^f (which was wide enough to admit of two carriages to pass conveniently) by accident drove against the plaintiff's curricl, the night being so dark that the parties could not see each other; it was holden, that the injury, which the plaintiff had sustained, having been immediate from the act of driving by the defendant, the proper remedy was trespass, *vi et armis* (4). But, as was truly observed by Le Blanc, J. if the defendant had simply placed his carriage in the road, and the plaintiff had run against it in the dark, the

^f *Leame v. Bray*, 3 East's R. 592.

(4) " The true criterion seems to be according to what Lord C. J. De Grey says, in *Scott v. Shepherd*, whether the plaintiff received an injury *by force* from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, according to all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." Per Lord Ellenborough, C. J. 3 East's R. 592. It was observed by Le Blanc, J. that " in actions for running down vessels at sea, difficulties may occur, because the force which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon." In *Ogle v. Barnes* and another, 8 T. R. 188. where an action on the case was brought, and the declaration alleged negligence and unskilfulness in the defendant's management of a ship, by reason whereof she ran foul of the plaintiff's with great force and violence. On motion in arrest of judgment after verdict for the plaintiff, on the ground of the action having been case when it ought to have been trespass, Grove, J. said, that the jury having found a verdict for the plaintiff, they must consider that the complaint set forth in the declaration was proved; and for such an injury an action on the case was the proper remedy. Lawrence, J. observed, that the negligent and imprudent management of the defendant's ship did not imply that any act was done by them; after having been guilty of the negligence which led to the mischief, they might have done every thing, in

injury would not have been direct, but in consequence ~~only~~ of the defendant's previous improper act; and then the proper form of action would have been that of an action on the case.

The plaintiff declared against the defendant, for driving his cart against the plaintiff's horse with force and violence^a, alleging it to have been done, "by and through the mere negligence, inattention, and want of proper care," of the defendant. On demurrer to this declaration, as not being in trespass, it was holden that it was good. Sir James Mansfield, C. J. observed, at the close of the decision, that it was not to be considered that the case of *Leame v. Bray*, was overturned by the present: at the same time he might say thus much, that upon a proper case it might be fit that the decision of the court of King's Bench, in *Leame v. Bray*, should be reconsidered. In an action of *trespass*^b, where the plaintiff declared that the defendant with force and arms drove a vessel, whereof the said defendant was the commander, against and over a certain boat of the plaintiff, and sunk her, *damno, &c. contra pacem, &c.*; it appeared, that the defendant was master and owner of the vessel by which the injury to the plaintiff's boat was committed; but that he, though on board at the time, did not give the order which caused the accident, but the pilot did; that it was nine o'clock at night, in the month of September, when the accident happened; that the vessel would not obey her rudder; and that it was owing to no design or wilful act of any person on board. Sir J. Mansfield, C. J. left it to the jury to say whether the accident was owing to the mere force of the wind, or to negligence. The jury were of opinion that the accident arose from negligence, and gave a verdict for the plaintiff. On motion to set aside this verdict, and enter a nonsuit, on the ground that the action should have been an action on the case, and not trespass, the court were of opinion, that trespass could not be maintained against the defendant; and said the case differed from the preceding case of *Leame v. Bray*, because here the defendant, though on board the vessel, did not give the order which occasioned the accident,

^a *Rogers v. Imbleton*, 2 Bos. & Pul. 446. ^b *Huggett v. Montgomery*, 2 N. R. 117.

their power to avoid the mischief, and then the running against the plaintiff's vessel might have been owing to the wind and tide. See further on this point, *Turner v. Hawkins*, 1 Bos. and Pul. 472.

but the pilot did; whereas, in *Leame v. Bray*, the defendant was driving the carriage which injured the plaintiff's carriage. The court at the same time intimated doubts as to the authority of *Leame v. Bray*, and *Chambre, J.* observed, that in cases of this kind it would be difficult to sustain the proposition, that a master could be liable to an action of trespass for a negligent act done by his servant in the course of his employment, for which the servant himself would also be liable in that form of action.

In a subsequent case of *Covell v. Laming*, 1 Camp. N. P. C. 497, which was *trespass* for running defendant's ship against plaintiff's, it appeared, that at the time of the accident, the defendant was on board his ship, at the helm, but that there was a desire on the part of the defendant to steer clear of the plaintiff, and that the accident was to be ascribed to the mere unskilfulness of the defendant. It was contended, that as the act was not wilful, an action on the case was the proper remedy; but, per Lord Ellenborough, C. J. "Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant, I consider, as the only just and intelligible criterion of trespass and case, it makes no difference, that here the parties were sailing on ship board. The winds and the waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force."

Where there is a gratuitous permission to use a chattel, as the possession constructively remains in the owner, he may maintain trespass for an immediate injury to it; but if the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving violently against him, the remedy of the owner of the horse against the owner of the cart is^k case, and not trespass; for this is in the nature of an injury to the plaintiff's reversion.

If the occupier of a house^l, who has a right to have the rain fall from the eaves of it upon the land of another person, fixes a spout, whereby the rain is discharged in a body upon the land, the proper form of action, by the owner of the land against the occupier of the house for this injury, is an action on the case; because the flowing of the water, which con-

^l *Lotan v. Cross*, 2 Camp. N. P. C. 464. ¹ *Reynolds v. Clarke*, Lord Raym. 1599. Str. 634. S. C.

^k *Hall v. Pickard*, 3 Camp. N. P. C.

stitutes the injury, is not the immediate act of the owner of the house, but the consequence only of his act, viz. the fixing the spout.

In an action upon the case, the declaration stated, that the plaintiff was master of a ship^m, which was laden with corn, ready to sail, and that the defendant seized the ship and detained her, *per quod querens impeditus et obstructus fuit in viagio*: An exception was taken to the action, on the ground that it should have been trespass *vi et armis*; and 4 Edw. 3. 24. 13 H. 7. 26. and Palm. 47. were cited; Holt, C. J. observed, that, in the cases cited the plaintiff had a property in the thing taken, but here the ship was not the master's but the owners'. The master declared only as a particular officer, and could recover for his particular loss. He admitted, however, that the master might have brought trespass, and declared upon his possession, which was sufficient to maintain that action.

So where the plaintiff declaredⁿ, that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, viz. an axe, &c. and being so possessed, gained a livelihood, &c. and by the licence of the defendant deposited the tools in defendant's house, who had detained them two months after request, whereby the plaintiff had lost the benefit of his trade. After verdict, a motion was made in arrest of judgment, on the ground, that the plaintiff ought to have brought detinue or trover; but the court held the action well brought; for, if the fact was that the plaintiff had the goods again, detinue was not proper; and though a detainer upon request was evidence of a conversion, yet it was not a conversion; and the damages which he demands in this case being special, the action ought to be special.

So where the plaintiff declared^o that he was possessed of a close of land and a decoy pond, to which wild fowl used to resort, and the plaintiff at his own costs had procured decoy ducks, nets, and other engines, for decoying and taking the wild fowl, and enjoyed the benefit in taking them; yet the defendant, intending to injure plaintiff in his decoy, and to drive away the wild fowl, and deprive him of his profit, discharged guns against the decoy pond, whereby the wild fowl

^m Pitts v. Guiney Salt, 10. Lord Raym. 558. S. C.
ⁿ Kettle v. Hunt, Bull. N. P. 78.
^o Keeble v. Hickeringill, 11 East, 574. n. from Holt's MS. Holt's Rep. 14.

17. 19. 11 Mod. 74. 130. 3 Salk. 9. Bull. N. P. 78. S. C. cited in Carlington v. Taylor, 11 East, 574. and 2 Camp. N. P. C. 258. S. C.

were frightened away, and forsook the pond. Upon not guilty pleaded, a verdict was found for the plaintiff, and 20*l.* damages. On motion in arrest of judgment, Holt, C. J. observed, that the action was maintainable; that although it was new in its instance, yet it was not new, either in the reason or principle of it. For, 1st, the using or taking a decoy was lawful: 2ndly, this employment of his ground to that use was profitable to the plaintiff, as was the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken, is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. The C. J. added, that it had been objected, that the nature of the wild fowl was not stated; but this was not necessary; for the action was not brought to recover damage for the loss of the fowl, but for the disturbance.

In a special action on the case^r, the declaration stated, that plaintiff's wife, unlawfully and against his consent, went away from him, and continued apart from him a long time, and that, during her absence, a large estate, real and personal, having been devised for her separate use, she thereupon was desirous of being reconciled, and of cohabiting with plaintiff, her husband; but that the defendant persuaded and enticed her to continue apart from the plaintiff, which she accordingly did until her death; *whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune.* After verdict for the plaintiff, with 3,000*l.* damages, on motion in arrest of judgment, it was objected, that there was not any precedent of any such action as this. Litt. s. 108. and 1 Inst. 81*b.* were cited; but Willes, C. J. said, that the general rule there mentioned was not applicable to the present case; that it would have been so, if there had never been any special action on the case before; that this form of action was introduced for this reason, that the law would never suffer an injury and a damage without a re-

medy ; but that there must be new facts in every special action on the case (5).

(5) See *Ashby v. White*, Lord Raym. 957. *Pasley v. Freeman*, 2 T. R. 51. and *Chapman v. Pickersgill*, 2 Wils. 146. which last case was an action on the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff; Pratt, C. J. (in answer to the objection of novelty,) said, that this was urged in *Ashby v. White*, but he did not wish ever to hear it again; that this was an action for a tort; torts were infinitely various, not limited or confined; for there was not any thing in nature which might not be converted into an instrument of mischief, and this of suing out a commission of bankrupt falsely and maliciously was of the most injurious consequence in a trading country. Durnford's note, Willes, 581. See also Hargrave's Co. Lat. 81, b. n. (2)

CHAP. XIII.

COVENANT.

- I. *Of the Action for Breach of Covenant.*
- II. *Of the Exposition of Covenants.*
- III. *Of the different Kinds of Covenants.*
 1. *Express, and herein of express Covenants running with the Land.*
 2. *Implied.*
 3. *Joint and Several.*
 4. *Void and Illegal.*
 5. *Not to assign without Licence.*
 6. *For quiet Enjoyment.*
- IV. *By whom the Action of Covenant may be maintained.*
 1. *Heir.*
 2. *Executor.*
 3. *Assignee.*
- V. *Against whom the Action of Covenant may be maintained.*
 1. *Heir.*
 2. *Executor.*
 3. *Assignee.*
- VI. *Of the Declaration, and herein of dependent Covenants, Conditions precedent, and independent Covenants.*
- VII. *Of the Pleadings:*
 1. *Accord and Satisfaction.*
 2. *Eviction.*
 3. *Infancy.*
 4. *Levied by Distress.*
 5. *Nil habuit in tenementis.*

6. *Non est factum.*
7. *Non infregit conventionem.*
8. *Performance.*
9. *Release.*
10. *Set off.*

VIII. *Payment of Money into Court.*

IX. *Evidence.*

X. *Judgment.*

I. Of the Action for Breach of Covenant.

COVENANTS are of two kinds,

1. Express.
2. Implied, or covenants in law.

An express covenant is an agreement entered into, by deed indented or deed poll, between two or more persons, for the performance of certain acts, or for the forbearance to do certain acts.

An implied covenant, or covenant in law, is an agreement, raised by implication of law between two or more persons, in a deed indented or deed poll, from certain technical expressions used therein.

For the violation of agreements of this kind (1) the law has provided a remedy by action of covenant, wherein the party injured may recover damages (2) in proportion to the loss sustained.

A party bringing covenant on a deed poll must be named

(1) In F. N. B. 4to. Ed. 343. A. it is said that in London a man shall have a writ of covenant without a deed, for covenant broken, and it is so said by Vavasor, Serj. in 22 Edw. 4. 2. a. cited in Comyn's Dig. London, N. 1. who refers to Priv. Lon. 149. in support of the same position.

(2) Where it is necessary to enforce the performance of any agreement in specie, as the conveyance of land, execution of deeds, &c. or what is termed a specific performance, application must be made to a court of equity; for in the action of covenant damages only for the non-performance can be recovered.

therein¹; for, where, upon over of the deed poll, it appeared, that the defendant promised to do a certain act, without saying, that he promised the plaintiff, it was holden that an action would not lie.

Covenant will lie on letters patent, although there is not any counterpart sealed by the lessee, who is to be charged².

If A., for a valuable consideration, promises, by deed, not to do a certain act, an action of covenant may be maintained for the breach of such promise; but an action on the case will not lie.

As where A. recovered a debt against B. and B. paid the condemnation money to A.³, whereupon A., by deed, released all actions, executions, &c. to B., and in the same deed promised to discharge all executions against B. upon the same judgment, and afterwards sued out execution thereon: the court were of opinion, that the promise being by deed, B's remedy was by an action of covenant, and not an assumpsit (3).

a *Green v Horne*, Salk 197 Comb 211 S C

b *Birt v Cumberland*, Cro Jac 399
5.1 fully stated, post 440

c *Bennet v Guildley*, B R M 16 Jac Cro Jac 505 S C and S P.
by the name of *Bennet v Hildersley*, said to have been adjudged,
1 R A 517 (A) pl 1

(3) Although it is a general rule that assumpsit will not lie, where there is a remedy of a higher nature⁴, yet there are some exceptions to this rule; as where two persons entered into articles of partnership for a term of years, and the deed contained a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the years were expired, and accounted together, and struck a balance, which was in favour of the plaintiff, including several items not connected with the partnership, and the defendant promised to pay it; it was holden, that assumpsit would lie on such express promise. And Buller, J. observed, that if no other articles had been introduced into the account, but those relating to the partnership, he should still have been of opinion, that assumpsit might have been maintained; for the question then would have been, whether a previous partnership being dissolved, and an account settled, was or was not, in point of law, a sufficient consideration for a promise. He had no difficulty in saying, that it was. *Foster v. Allanson*, 2 T. R. 479. A stronger exception, however to the general rule above-mentioned will be found in the case of *Nurse v. Craig*, ante, p 262.

⁴ *Bulstrode v. Githum*, Str. 1027.

An action of covenant is not within the stat. 3 W. & M. c. 14^d. which makes the devisee chargeable jointly with the heir for the debts of his testator in respect of lands devised to him: the remedy there given is confined to the action of debt.

II. Of the Exposition of Covenants.

COVENANTS are to be construed according to the obvious intention of the parties^a, as collected from the whole context of the instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense of the words. If there be any ambiguity, then such construction shall be made as is most strong against the covenantor (4); for he might have expressed himself more clearly (5).

It is immaterial in what part of a deed any particular covenant is inserted^f; for, in the construction of it, the whole deed must be taken into consideration, in order to discover the meaning of the parties; as where, in an indenture of lease of a colliery^g, two lessees covenanted *jointly and severally in manner following*, viz. &c. here followed a number of covenants in respect to working of the colliery, wherein the lessees covenanted jointly and severally; then followed a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c. (not saying, "and each of them"); it was holden by the court (*absente* Kenyon, C. J.) that the general words, at the beginning of the covenants by the lessees,

d *Wilson v. Knubley*, 7 East, 128.

f Per Buller, J. 5 T. R. 526.

e Plowd. 399. cited by Ellenborough, C. J. *Iggulden v. May*, 7 East, 241.

g *D. of Northumberland v. Ward Erington*, 5 T. R. 523.

(4) See the opinion of Sir J. Mansfield, C. J. in *Flint v. Brandon*, 1 Bos. and Pul. N. R. 78.

(5) In like manner, where the words of the grant are doubtful, they are to be construed in favour of the grantee. This general principle has been applied to the construction of leases; hence it has been holden, that under a lease for fourteen or seven years, *the lessee only* has the option of determining it at the end of the first seven years. *Doe d. Webb v. Dixon*, 9 East, 15. in which the authority of *Dann v. Spurrier*, 3 Bos. and Pul. 399. 442. was recognized.

"jointly and severally, &c. in manner following," according to the general rules of construction, extended to all the subsequent covenants on the part of the lessees throughout the deed, there not being any thing in the nature of the subject to restrain those words to the former part of the lease.

In conformity to the rules before laid down for the construction of covenants, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined :

As where A. leased a manor to B. for years, excepting all woods, great trees, timber trees, and underwood^b, &c. and covenanted with the lessee, that he might take fire-boot, *super dicta præmissa*, it was holden, that the lessee could not take fire-boot in a close of wood parcel of the manor, because, by the exception of the wood, the soil thereof was excepted ; and the words *super præmissa* should be intended of such things only as were demised. It was admitted, however, that, by the covenant, the lessee was entitled to take the wood upon the other lands, for though the wood was excepted yet the land was demised.

The defendant sold the plaintiff a lease^c for years of a manor, and entered into a bond, with a condition that *he would not do, nor had done*, any act to disturb the plaintiff, *but* that the plaintiff should hold and enjoy without the disturbance of the vendor, *or any other person* ; it was holden that the condition was confined to acts done or to be done by the vendor, on the ground of the latter words being referrible to the former.

So where in covenant against the executors of J. W.^d, the declaration stated, that J. W., by indenture, granted land, &c. to the plaintiff in fee, and warranted the land, &c. *against himself and his heirs*, and covenanted that he was, *notwithstanding any act by him done to the contrary*, lawfully and absolutely seised in fee simple, *and that he had a good right, full power, and lawful and absolute authority to convey* ; and assigned a breach, that J. W. *had not* at the time of making the said indenture, nor at any time before or since, good right, full power, and lawful and absolute authority to convey or assure the premises to the plaintiff in manner aforesaid. The defendants prayed oyer of the indenture,

^b *Cage v. Paxlin*, 1 Leys. 116. cited by Ellenborough, C. J. & East, 241.

^c *Broughton v. Conway*, Moor, 58.

cited by Lord Ellenborough, C. J. in *Gale v. Reed*, 5 East, 29.

^d *Browning v. Wright*, 2 Bos. & Pul. 12.

before, on request of the lessee to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, with *all* covenants as in that indenture were contained;" it was holden, that this covenant was satisfied by a tender of a new lease for 21 years, containing *all* the former covenants, except the covenant for future renewal.

In covenant^a, the plaintiff declared upon an indenture, whereby the defendant demised to the plaintiff for a term of years, certain parts of a messuage then lately parted off from the part occupied by the defendant, with certain easements belonging to the same, and a portion of an adjoining yard: and the defendant covenanted that he would permit the lessee (the plaintiff) to have the use of the pump in the said yard jointly with the defendant, *whilst the same should remain there*, paying half the expenses of keeping it in repair. The plaintiff assigned for breach, that during the continuance of the lease, the defendant, without reasonable cause, and in order to injure the plaintiff, took away the pump, although plaintiff was willing to have paid half the expense of keeping the same in repair. On demurrer it was holden, that the breach was ill-assigned; for the use (6) of the pump was not a specific subject of the demise; and by the introduction of the words, "*whilst the same should remain there*," it appeared that the lessor meant to reserve himself the liberty of removing the pump, from whatever capricious or unreasonable motive he might do so; and that it was not inconsistent with the stipulation, that the lessee should pay half the expenses of repair, whilst the pump remained on the demised premises.

^a *Rhodes v. Bullard*, 7 East, 116.

(6) The demise of the use of a thing is the demise of the thing itself. *Pomfret v. Ricroft*, 1 Saund. 321.

Of the different Kinds of Covenants.

1. *Express, and herein of express Covenants running with the Land.*
2. *Implied.*
3. *Joint and Several.*
4. *Void or Illegal.*
5. *Not to assign without Licence.*
6. *For quiet enjoyment.*

1. Of Express Covenants, and herein of express Covenants running with the Land.

THERE is not any precise form of words necessary to constitute an express covenant^a; any form of words or mode of expression in a deed, which clearly evinces an agreement, will amount to a covenant, for a breach whereof an action of covenant may be maintained :

As if it be *agreed* between A. and B.^b, by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day.

So if lessee for years covenant to repair^c, " *provided all ways, and it is agreed*, that the lessor shall find great timber;" this word *agreed* will make a covenant on the part of the lessor to find great timber. Secus, if the word *agreed* had been omitted^d.

So if A. lease to B., on *condition*^e that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them; if he does not leave them in good repair, an action of covenant lies.

So where covenant was brought on a writing sealed^f, whereby the defendant's testator *acknowledged himself to be accountable* to the plaintiff for all such monies as should be

^a Moor, 135.

^b *Pordage v. Cole*, 1 Saund. 219, 1 Lev.

574 T. Raym. 183. S.C.

^c 1 Rol. Abr. 518, (C) pl. 2.

^d 1 Rol. Abr. 518, (C) pl. 3.

^e 1b pl. 5 40 E. 3. 5 b.

^f *Brice v. Carr* and others, Executors of J. S., 1 Lev. 47.

charged by plaintiff on A. *to be paid to B.*; and alleged, that he the plaintiff charged a certain sum of money on A. *to be paid to B.*, and that the defendant's testator had not paid it; it was objected, that covenant did not lie, and that the proper form of action was an action of account; but it was holden, that covenant would lie in this case, and on any words, in a deed, purporting an agreement for the payment of money.

* So in the case of a lease for years *rendering* rent⁷; it was adjudged, by the court (*absente* Holt, C. J.) that the *render* made a covenant.*

So where covenant was brought against executrix of assignee of lease for years⁸, by indenture, for rent arrear in the time of the executrix upon the words *yielding and paying*; it was holden, that the action would lie; and the opinion of the court was, that the words "*yielding and paying*," (7) in the indenture made an express covenant, and were not a bare covenant in law.

So in covenant against the assignee of lessee for years, upon an indenture⁹, whereby plaintiff demised to the lessee a house, *excepting a room, with free liberty of passage* through other rooms of the house unto the room excepted. Lessee assigned the lease; and the assignee stopped the passage, whereupon plaintiff brought this action, declaring for a breach of covenant. Resolved, by the court, that this exception amounted to a reservation, upon which covenant would lie; and they compared it to the preceding case of rent reserved, where covenant will lie upon the words of reservation, without any *express* words of covenant.

u *Giles v. Hooper*, Carth. 175.

x *Porter v. Sweetnam*, Sty. 406. 431.

y *Bush v. Cokes*, Carth. 232. Salk. 196. S. C.

(7) These words, *yielding and paying*, have sometimes been considered as sufficient to raise a covenant by implication of law only. See a dictum to this effect, 1 Sidf. 447. and Kenyon, C. J. so considered them in *Webb v. Russel*, 3 T. R. 402. The same opinion is adopted by Serjeant Williams in his notes to the first volume of Saunders, p. 241 b, note 5. But in addition to the authorities in the text, it may be observed, that in Rolle's Abridgment, Covenant (C.) the title of which is "What words will make an express covenant," in pl. 10. p. 519. this case is put as an instance of an express covenant: "If a man lease land for years, reserving a rent, an action of covenant lies for the non-payment of the rent; for the *reddendo* of the rent is an agreement for the payment of the rent, which will make a covenant."

Where the law creates a duty or charge^a, and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but, where the party, *by his own contract*, imposes on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident; because he might have provided against it by his own contract (8).

A lease for years was made by indenture^a, of a meadow bounded on one side by a river, and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; afterwards, by a sudden and violent flood, the banks were destroyed, and, by the opinion of Fitzherbert and Shelley, Js. "the law is, that the lessee is excused from the *penalty*, because it is the act of God, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, because of his own covenant."

So where the assignee of a reversion brought covenant against lessee of a house for non-payment of a year's rent^b; defendant prayedoyer of the lease, which contained a covenant, on the part of the defendant, to repair the house during the term, except it should be destroyed by fire, and then pleaded, that before any part of the rent in question became due, the premises were destroyed by fire, against the will of defendant, and were not rebuilt by the lessor or the plaintiff; and that the defendant did not occupy the premises during the year for which the rent was claimed. On demurrer, it was holden, on the authority of *Paradine v. Jane*, *Aleyn*, &c.

^a *Paradine v. Jane*, *Aleyn*, 27.

^b *Monk v. Cooper*, *E. 18 G. B. R. Str*

a Dyer, 33. a. E. 28 & 29 H. 8. C. B. 763. 2 *Ld. Raym.* 1477. S. C.

(8) This rule, extracted from the case of *Paradine v. Jane*, has been recognized in many subsequent cases^c; and in *Beale v. Thompson*, *C. B. E. 43 Geo. 3. 3 Bos. & Pul. 420*. *Chambre, J.* speaking of this case says; "the court took a rational distinction, that where an obligation is imposed by rule of law, and there is not any express covenant, the law introduces a reasonable exception, viz. that an act of irresistible violence will excuse the party; but if a party enter into an absolute contract, without any qualification or exception, and receives from the party, with whom he contracts, the consideration for such engagement, he must abide by the contract, and either do the act, or pay damages, his liability arising from his own direct and positive undertaking."

^c *Atkinson v. Ritchie*. *B. R. H. 49 G. 3 10 East*, 533.

that the defendant was bound by his express covenant to pay the rent during the term^c.

The doctrine laid down in the preceding case having been alluded to in argument in *Cutter v. Powell*, 6 T. R. 323. Lord Kenyon, C. J. said, "that it must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction; Lord Northington said, "that if the tenant would give up his lease, he should not be bound to pay the rent." Probably the case here alluded to by Lord Kenyon was the first of the following cases :

The plaintiffs were tenants to the defendants of a house^d, &c. by lease, in which there was a covenant by the plaintiffs to do all repairs, accident by fire only excepted; the defendants had insured the buildings, which were burned down; the insurers paid the loss: the defendants declined rebuilding, and brought an action of covenant for the rent accrued due after the accident had happened. The plaintiffs filed a bill in the Court of Chancery for an injunction, and obtained the common injunction: the defendants on coming in of the answer, moved to dissolve the injunction, they having by their answer offered to remit the rent, upon a surrender being made of the lease, which the plaintiffs declined, as the lease was beneficial. The plaintiffs had pleaded at law the truth of the case in bar of the action: and on a demurrer to this plea, the plaintiffs were advised not to argue the demurrer, but to apply to a court of equity. On shewing cause against dissolving the injunction, Lord Northington, Chr. inclined to think, that the matter pleaded was a good defence at law, but that, in all events, a court of equity ought to restrain this action, until the house, &c. were rebuilt; and therefore continued the injunction.

Bill brought for a specific performance of a covenant^e for quiet enjoyment contained in a lease of certain houses demised by defendant to plaintiff, and to have 500*l.* laid out in rebuilding the houses, (which had been burned down by accident since the execution of the lease) and for an injunction to restrain defendant from proceeding at law. N. The 500*l.* had been received by the defendant from the insurance office on account of the insurance of these houses. Defendant, by his answer, offered to accept a surrender of the lease.

^c See *Belfour v. Weston*, 1 T. R. 310. S. P.

^d *Canden and another v. Morton and another*, in Case. E. 4 G. 2. MSS.

^e *Brown vs Quilter*, in Case. 1 June, 1764, MSS. Amb. 619. S. C. But see *Hare v. Grove*, 3 Anstr. 687. and *Holtzapfel v. Baker*, 18 Ves. 115.

For Northington, Ch. "There is not any covenant from the landlord to rebuild. A court of equity can decree a specific performance in those cases only, where clear directions can be given in what manner, and when the act is to be performed. It would be most arbitrary for me to decree a rebuilding in a case, where there is not any covenant for the rebuilding. All that can be required from a court of equity is, in a case like this, when an action shall be brought for rent, to order an injunction, until the houses are rebuilt, or the lease delivered up. In the present case, there has not been any action brought for the rent, and the defendant has offered to accept a surrender of the lease, which is all the relief the plaintiff is entitled to." There being a valuable wharf on the demised estate, the plaintiff declined surrendering his lease; the bill therefore was dismissed with costs (9).

But where there are no special circumstances the general rule prevails, that equity follows the law; and a court of equity will not restrain a party from proceeding at law for rent arrear after the premises are destroyed by fire; the agreement for payment of the rent being without restriction^g.

The lessee of a house on a general covenant to repair during the term, is bound to rebuild, in case the house be consumed by an accidental fire^f (10). So on a covenant to erect

^f *Hare v. Groves*, 3 Anstruther, 687. ^g *E. of Chesterfield v. D. of Bolton*,
recognized and acted upon in *Holt- Com R. 337. Bullock v. Domant*,
zapfel v. Baker, 18 Ves. 115. 6 T. R. 650. S. P.

(9) Ejectment by tenant against landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant to pay the rent, but he had not paid any after the time of the fire. Lord Mansfield, C. J. said, the consequence of the houses being burned down was, that the tenant was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The houses having been burned down four years before action brought, and the rent not having been paid during that period, he left it to the jury to consider whether it was not to be presumed, that the tenant had abandoned the lease at the time of the fire; and accordingly the jury found a verdict for the defendant. *Pindar v. Ainsley*, Middlesex Sittings after M. T. 1767. cited by Buller, J. 1 T. R. 312.

(10) In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessors. It appears from the case of *Monk v. Cooper*, and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for

a bridge in a substantial manner, and to uphold and keep in complete repair, for a certain time; although the bridge be broken down by an extraordinary flood, yet the party covenanting is bound to repair^h. See *Shubrick v. Salmon*, 3 Burr. 1037. to the same effect.

Of express Covenants running with the Land.—Express covenants, which run with the land, entered into by lessee for years for himself, his executors, administrators, and assigns, are binding on the lessee and his personal representative (having assets) during the continuance of the term; although such covenants are broken, after an assignment of the term by the lessee, and after an acceptance of rent from the assignee by the lessor, or grantee of the reversion; and there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory assignment by virtue of the bankrupt lawsⁱ.

In covenant against lessee of a house by indenture^k, where in the lessee had expressly covenanted for himself, his executors, and assigns, that he would repair within a month after warning; the breach assigned was for not repairing the house within a month after warning given: the defendant pleaded, that a long time before that warning he assigned his term to J. S. who had paid his rent always afterwards to the plaintiff, who had accepted the same; and then averred performance of all the covenants until the assignment; the plaintiff demurred, on the ground that this assignment did not take from the lessor his advantage of the *express* covenant; and, notwithstanding his acceptance of rent, by the hands of the assignee, yet he might charge the lessee or assignee at his election; and the whole court being of that opinion, it was (*without argument*) adjudged for the plaintiff. The same point

^h *Brecknock Company v. Pritchard*, 6 stat. 49 G. 3. c. 121. s. 19. ante, T. R. 730. p. 336.

ⁱ *Auriol v. Mills*, 4 T. R. 94. But see ^k *Barnard v. Godscall*, Cro. Jac. 309.

payment of the rent, as well as into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent as well as rebuilding, in case the house should be destroyed by fire or tempest.

In *Walton v. Waterhouse*, 3 Saund. 420. covenant was brought against lessee of a house for not repairing; defendant pleaded that the house had been destroyed by fire, but in convenient time after had been rebuilt. Plaintiff demurred specially, because defendant did not shew by whom the dwelling house was rebuilt.—Judgment for plaintiff.

was ruled in *Ventrice v. Goodcheap*, 1 Roll. Abr. 522. N. pl. 1. where the lessee had covenanted for himself and his assigns to repair; on the ground that the lessee had expressly covenanted for himself and his assigns, and that this personal covenant could not be transferred by the acceptance of the rent.

So where the breach was for non-payment of rent¹ (11). In *Mayor v. Steward*, 4 Burr. 2439. it was holden, that a bankrupt was bound by an express collateral covenant (to indemnify plaintiff against the covenants of a lease), which had been broken after act of bankruptcy committed, and after defendant had obtained his certificate.

From the foregoing cases it appears clearly, that express covenants, which run with the land, entered into by lessee for years for himself, his executors, administrators, and assigns, are binding on the lessee during the continuance of the term, although such covenants are broken after an assignment of the term by the lessee, and after the acceptance of rent from the assignee by the lessor or grantee of the reversion; it remains only to add, that such covenants, under

¹ *Devon v. Collier*, 1 Rol. Abr. 522. (N.) pl. 1. *Crofts v. Taylor*, *ibid.* Adj on dem. S. P.

(11) The following authorities may be referred to as tending to establish the same point. *Fisher v. Amers*, 1 Brownl. 20.—*Thursby v. Plant*, 1 Sidf. 402.—1 Sidf. 447. Nota.—*Boulton v. Cann*, Freem. 337.—*Ashurst v. Mingay*, 2 Show. 134. *T. Jones*, 14 S. C.—*Edwards v. Morgan*, 3 Lev. 233.—*Jodderell v. Cowell*, Ca. Temp. Hardw. 343.—*Auriol v. Mills*, 4 T. R. 94. I am aware of one dictum only in opposition to these authorities, that of *Jerman, J.* in *Whitway v. Pinsent*, Sty. 300. who took a distinction between covenants for payment of rent, and covenants to repair; observing, that “if lessee for years assign his term, the lessor having notice thereof, and the lessor accept rent from the assignee, he cannot demand rent of the lessee afterwards; yet he may sue other covenants contained in the lease against him, as for reparations or the like.” It may be remarked that, if an express covenant for payment of rent be a covenant, which runs with the land, (of which there cannot be any doubt; indeed it was so considered by Lord Ellenborough, C. J. delivering the opinion of the court in *Stevenson v. Lambard*, 2 East’s R. 580.) all the cases, which have decided, that the obligation imposed on lessee for years, by an express covenant to repair, is not, as far as respects the action of covenant, cancelled by an assignment of the term, and the lessor’s acknowledgment of the assignee as his tenant, are authorities for the same position with respect to express covenants for payment of rent.

the same circumstances, are binding on the personal representative of the lessee *having assets*.

In covenant by lessor against the executor of lessee for years^m, by indenture, of a garden adjoining to the house of the lessor, in which indenture lessee had covenanted for himself, his executors, and assigns, that he would not erect any building in the garden to the prejudice of the lessor's lights; it was alleged that an assignee of defendant's testator had erected an house in the garden to the prejudice of the lessor's lights. Defendant pleaded an assignment of the term to J. S. who had paid rent to the lessor, and had been accepted by him as tenant. On demurrer, it was contended, on the part of the defendant, that by the assignment and acceptance of rent, the privity of contract was determined, more especially as it was a contract which concerned an act to be executed on the land, and therefore running with the land; but the court conceived, that as it was an *express covenant*, that the lessee should not build, it should bind him and his executors; and neither an assignment, nor an acceptance of rent, by the hands of the assignee, could deprive the lessor of the advantage of suing the lessee or his executors on an express covenant. Judgment for plaintiff.

Queen Elizabeth, by letters patent, demised a house for yearsⁿ, which the lessee covenanted to repair. On the death of the queen, the reversion descended to King James; when the lessee assigned his term, and the assignee paid rent to the king, who afterwards granted the reversion to the plaintiff; the house being out of repair, the plaintiff brought covenant against the executors of lessee for a breach of the covenant committed after an assignment of the term and reversion, and after plaintiff had accepted rent from the assignee of the term; it was holden, that the action would lie, on the ground that it was a covenant in fact, by the express words, running with the land; and that, notwithstanding an assignment, the covenantor and his executors were always chargeable, so that he could not either by the assignment of his estate, or by any other act, discharge himself or his executors, (who were chargeable by the act of the testator) *having assets*, as long as the reversion continued in the lessor; and by the express words of stat. 32 H. 8. c. 34, such remedy, as the lessor might have had against the lessee or his executors, the assignee shall have against them; *it being a covenant in fact, which runs with the land*.

^m Bachelour v. Gage, executor of Gage, B. R. E. 6 Car. Cro. Car. 184. and Sir W. Jones, 223. Arthur v.

Vanderplank, B. R. H. 7 Geo. 2. MS. S. P.

ⁿ Brett v. Cumberland, B. R. 16 Jac. Cro. Jac. 521.

2. Of Implied Covenants.

There are certain words^o, which though of themselves they do not import any express covenant, yet when used in contracts by deed will amount to a covenant.

*As if A., by indenture, "*demise and grant*" lands to B. for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant; and A. is estopped from saying that B. was not in by the lease.

So if a lessor demise land for a term of years^a, and afterwards by the words *dedi et dimisi* demises the same land to A. for life, who enters and is ousted by the termor for years, A. may maintain an action against the lessor on the implied covenant, and have satisfaction in damages for the chattel evicted; for he continues seized of the freehold.

In covenant on a lease for years made by the defendant by the word *dimisi*^r, it was averred, that at the time of the lease made, the lessor was not seized of the land, but a stranger; it was objected, that the entry of the lessee by force of the lease, and ejection by the stranger, or some person claiming under him, were not alleged: but the court was of opinion, that the action would lie; for the breach of covenant was, that the lessor had undertaken to demise that which he could not, the word *dimisi* importing a power of letting, as *dedi* does a power of giving; and they added that it was not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass.

And where a lease for years is made by the word "*demise*," the assignee of the lessee is entitled to the same advantage as the lessee, and may in case of eviction maintain an action on the implied covenant.

The implied covenant follows the nature of the interest granted:

As where A. and B. made a lease by the word "*demise-runt*," it was holden, that the implied covenant was joint, viz. that A. and B. had a power to demise, and that an action on the ground of their not being seized at the time of the demise should be brought against both, and could not be maintained against one only.

^o 48 Edw. 3. s. b. 1 Rol. Abr. 519. (F.)
^p Style v. Hearing, Gro. Jac. 73.

^q Pincombe v. Rudge, Yelv. 139
^r Holder v. Taylor, Hob. 72. 1 Inst.

301 b.

^s Spencer's Case, 5 Co. 17. s. 4th Resolution.

^t Coleman v. Sherwyn, Carth. 97.
^u Salk. 137. S. C.

The generality of an implied covenant may be qualified and restrained by an express covenant:

As where the lessor *demised and granted* a house for a term of years^a, and covenanted, that the lessee should enjoy the house during the term, *without eviction by the lessor, or any claiming under him*; it was holden, that the express covenant qualified the generality of the covenant raised by implication of law from the words *demise and grant*, and restrained it by the mutual consent of both parties, so that it should not extend farther than the express covenant (12). Sir E. Coke, from whose reports this case has been extracted, subjoins as follows: "And there is great reason, that the particular covenant subsequent should qualify the general force of this word '*demise*;' for if the force of this should stand, the particular covenant would be in vain—and these words '*demised and granted*,' are frequent in every common lease; and the better construction of deeds is to make one part of a deed expound another, and so to make all the parts agree, and, as far as it can be done, according to the true intention and meaning of the parties (13)."

So where in covenant on an indenture^x, whereby the defendant granted a fee farm rent to the plaintiff, which he had purchased of the late trustees for sale of the king's tenements, and covenanted that he was seized in fee, and had good right to sell; the breach assigned was, that he had not good right: the defendant pleaded, that it was further agreed in the same indenture, that all the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurred; and although this was a remote agreement at the end of the deed, at a great distance from the other covenant, it was adjudged, that

^a *Nokes's Case*, T. 41 Eliz. B. R. 4 Co. 80. b.

^x *Brown v. Brown*, 1 Lev. 57.

(12) This case is stated as it is reported in Coke; in Croke's report of the same case, Cro. Eliz. 674. it is said, that Popham, C. J. inclined to this opinion, but that the other justices did not deliver any opinion thereon, and that judgment was given on another point; Coke's report, however, is adopted by Hale in *Deering v. Farrington*, 1 Mod. 113. and recognized by Vaughan in *Hayes v. Bickerstaff*, Vaughan, 126.

(13) The doctrine of implied covenants is confined to real property. Hence if goods be *demised* for years, and the lessee be evicted, covenant does not lie; for the law does not create a covenant for a personal thing. Com. Dig. Cov. (A. 4.).

it had qualified the first covenant, and restrained it to acts done by the *covenantor only*; as in Nokes's case. Judgment for defendant. See also *Browning v. Wright*, 2 Bos. & Pul. 13. and ante, p. 429.

Of joint and several Covenants.

Where the interest (14) of the covenantees is joint, the action of covenant follows the nature of the interest, and must be brought in the names of all the covenantees; and this rule holds, even where the *covenant* is joint and several: (15) as where B. by indenture covenanted with C. and D. and to and with E. and F. his wife, (who afterwards became the wife of D.) and their assigns, *and to and with each of them*, that he (B.), at the time of sealing and delivering the indenture, was lawfully and solely seized of a certain rectory; an action was brought by D. and F. his wife, for a breach of the covenant: after verdict and judgment for the plaintiffs in B. R., the judgment was reversed on error in the Exchequer Chamber, upon the ground that, notwithstanding the words "*and to and with each of them*," the other covenantee should have joined in the action (16).

y Shingaby's Case, on error, Exchequer Chamber, 5 Rep. 18. b. 3 Leon. 160, 161 S. C.

(14) Where the legal and beneficial interests are not united in the same person, this term is to be understood of the legal interest. See *Anderson v. Martindale*, post, p. 445.

(15) For the wording of the covenant cannot make that, which was before joint, several. So on the other hand, where the interest is several, although the *covenant* be joint, yet it shall be taken to be several. Bull. N. P. 157. "Where the covenant is to several, for the performance of several duties to each, the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach as far as his own interest extends." Per Kenyon, C. J. in *Anderson v. Martindale*, 1 East's R. 501.

(16) When it appears on the face of the declaration, that each of the covenantees is to have a several interest or estate, then the addition of the words "*with each of them*" will make the covenant several in respect of their several interests; as if one by indenture demise Blackacre to A. and Whiteacre to B. and covenant with each of them, that he is lawful owner of both the said acres; then in respect of the several interests, the covenant by those words is made several. 5 Rep. 19. a.

The defendant and one G.^a covenanted for themselves, and for each of them, with the plaintiff and one C. to receive rents due to the plaintiff and C. in Ireland, and also that they and each of them would pay a moiety thereof to each of them, the plaintiff and C.; in covenant by plaintiff against defendant alone for the recovery of plaintiff's moiety, the breach assigned was, that although defendant and G. received 7,000*l.* neither the defendant or G. had paid any money to the plaintiff: on motion, in arrest of judgment, it was holden, 1st. that the covenant, being to pay a moiety to each, the interest was several, and consequently the action was well brought by the plaintiff alone. 2ndly, that the defendant had covenanted for the acts of his companion, as well as for his own acts, and consequently that the action was well brought against the defendant, and the breach well assigned.

If a lease be granted to A. and B.^a, to commence at a future day, and A. and B. jointly, and severally covenant for the performance of certain acts, and A. dies before the day, the covenant being joint and several, will be binding on the executors of A., although the *interesse termini* survive to B.

Where the interest of the covenantees is joint^b, if any of them die, the action must be brought by the survivors, averring the deaths of their companions (17). As where A. by indenture, covenanted with B. and C., that he (A.) would enter into a bond to pay B. a sum of money on a certain day: B. died; B.'s administrator brought covenant; it was adjudged, that it did not lie; for although the money was to be paid to B., who was dead, yet he w^{as} survived and was party to the indenture ought to sue; for B. and the survivor make as to this purpose but one person; as if a bond is made to three to pay money to one of them, all ought to join in the suit: for they are all as one, obligee: and if he who ought to have the money dies, the survivors must sue; although they have not any interest in the sum contained in the condition: so in this case, the money payable to B., in his life-time, being to be obtained by suit on

^a Lilly v. Hodges, 8 Mod. 166. Str. ^b Rolla v. Yate, Yelv. 177. 1 Balstr. 558. S. C.
^a Eays v. Douthorn, 2 Burr 1190. 33, 6. S. C. Judgment affirmed on error.

(17) If one named as covenantee in the deed did not execute; in an action brought by his companions, it ought to be averred. Vernon v. Jefferys, Str. 1146. 7 Mod. 358. 8vo. ed. S. C., more fully reported.

this indenture, an action cannot be brought thereon, except by those who are parties during their lives, and after their death by the executor or administrator of the survivor.

So where Rt. Mackreth for himself, and the defendant as his surety^c, jointly and severally covenanted with J. Anderson, his executors, administrators, and assigns, and also with E. Wyatt and her assigns, that he (Mackreth) would pay to Anderson, his executors, and administrators, an annuity during the life of E. Wyatt; Anderson died intestate, and an action was brought by his administrator against the defendant on the covenant, assigning as a breach the non-payment of the annuity. On *demurrer*, it was holden, that the covenant being both to Anderson and Wyatt for the same thing, although the benefit were only to Wyatt, yet both had a legal interest in the performance of it, and therefore, such interest being joint, during the lives of both, on the death of one, it survived to the other.

The reversion of lands demised by indenture to the defendant for years^d, was conveyed to A. and B. and the heirs of B., in trust for A. and his heirs; A. brought an action against defendant, on a covenant to repair contained in the lease, stating his title as before mentioned; on *demurrer*, it was holden, 1st. that A. and B. were joint assignees of the reversion, the effect of which was, that the defendant's covenants became, by operation of law, contracts with A. and B. jointly, and that all causes of action to them arising out of those contracts, must follow the nature of the contracts, and must accrue to A. and B. jointly: 2dly. That on *general demurrer*, it could not be intended that B. the joint covenantee was dead, in order to sustain the declaration; that plaintiff ought to have shewn what was necessary to make out his title, and having by his own statement given the legal estate to himself and another, he ought to have taken upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he should therefore have averred that B. was dead.

From the preceding cases of *Anderson v. Martindale*, and *Scott v. Godwin*, it appears, that if the objection on the ground of other covenantees not being joined as plaintiffs arises on the face of the declaration, the defendant may take advantage of it by *demurrer*, and according to *Slingsby's case*, by writ of error (18).

^c *Anderson administrator, &c. against* *d Scott v. Godwin, C. B. E. 27 G. 3.*
Martindale, B. R. T. 41 G. 3. 1 Bos. & Pul. 67.

¹ *East's R. 497.*

* The defendant covenanted*, that he would not agree for the taking the farm of the excise of beer and ale for the county of York, without the consent of the plaintiff and another; and the plaintiff alone brought this action of covenant; and assigns for breach, the defendant's agreeing for the said excise, without his consent; upon which the plaintiff had a verdict, and one thousand pounds damages given. The court were of opinion, that here was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for, suppose one of them had given his consent, that the defendant should farm this excise, and had secretly received some satisfaction or recompense for so doing, is it reasonable, that the other should lose his remedy, who never did consent?

4. *Of void and illegal Covenants.*

Although the law^f, from the deliberation and solemnity which accompanies the execution of a deed, presumes a consideration, and delivers the covenantee from the necessity of proving it, yet that doctrine applies only, where the deed is good on the face of it: for a consideration cannot be presumed to support a deed which is void on the face of it.

Hence where in covenant the plaintiff declared, that defendant, being single and unmarried^g, by deed promised the plaintiff (she being sole and unmarried), that he would not marry with any other person except herself, and if he should marry with any other, then he agreed to pay plaintiff a cer-

e *Wilkinson v. Lloyd*, 9 Mod. 82.

f *Lowe v. Peers*, 4 Burr. 5225 *Wilmot* 364. S. C.

g *Lowe v. Peers*, 4 Burr. 2225. *Wilmot* 364. S. C. cited in *Gibson v. Dickie*, 3 Maule and Selwyn, 463.

brings an action, without averring in the declaration that the others are dead; the defendant may either take advantage of it at the trial, as a variance on the plea of *non est factum*, *Serjeant Williams*, 1 *Saunders*, 154. n. (1), or he may crave oyer, and demur generally. *Bull. N. P.* 158. and per *Lee, C. J.* in *Vernon v. Jeffries*, 7 Mod. 360. 8vo. ed. In *Eccleston v. Clipsham*, 1 *Saund.* 153: the objection having been taken in arrest of judgment the plaintiffs discontinued. N. Where there are two covenantors and one only is sued, the defendant must take advantage of the omission by plea in abatement. Per *Lee, C. J.* in *Vernon v. Jeffries*, 7 Mod. 360. 8vo. edit.

tain sum of money within a fixed time after such marriage; the declaration, after averring that defendant had married another person, assigned for breach, the non-payment of the money: It was adjudged, after motion in arrest of judgment, in *B. R. 4 Burr. 2225.*, and afterwards in the Exchequer Chamber, on writ of error, 14th November, 1769, (see notes of opinions and judgments by Wilmot, C. J. p. 364.) that this covenant, not to marry any body except a person, who was not obliged to marry, being to every purpose the same as a general restraint, and being unsupported by any consideration, the principle of public utility interposed, and forbade the sustaining an action for the breach of it.

A covenant by a husband to pay to trustees a certain annual sum^h, by way of separate maintenance for his wife, in case of their future separation, with the consent of such trustees or their executors, is valid in law.

A covenant by a friend of a bankrupt to pay all his creditors their full debtsⁱ, in consideration that they will not proceed any further under the commission, is good in law.

Where the principal act to be performed, as conveying an estate, granting a lease, &c. is void, relative and dependent covenants are void also; as where A., being possessed of a term^k, granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment; the lease being void for uncertainty, the covenant was holden void also.

But where a covenant is a distinct, separate, and independent covenant, not referring to the estate intended to be granted, nor waiting upon it; in that case, although no estate is granted, yet the covenant will be valid (19). As where in covenant^l, the plaintiff declared, that defendant, by deed, granted to plaintiff in fee, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that defendant covenanted to pay the money

^h *Rodney v Chambers*, B. R. E.
42 Geo. 3 2 East's R 283.

ⁱ *Kaye v. Bolton*, 6 T R 124.

^k *Capenhurst v Capenhurst*, T. Raym.
27 1 Lev 45 4 C

^l *Northcote v. Underhill*, Salk. 199.

(19) When that which is good and that which is void are put together in the same grant, the common law makes such a construction, that the grant shall be good for that which is good, and void for that which is void. Per Hutton, J. *Ley's Rep.* 79. cited by Lawrence, J. 8 East, 236.

to plaintiff, and breach assigned for the non-payment of the money. After judgment by default and writ of inquiry executed, it was objected, that nothing passed by the deed for want of enrolment, which was admitted; and hence it was inferred, that the covenant was void. But Holt, C. J. said, that it was not material whether any estate passed; for the covenant to pay the money was a distinct, separate, and independent covenant.

So where a rector granted an annuity out of his benefice^m, which is void by stat. 13 Eliz. c. 20., and in the same deed covenanted personally to pay the rent-charge; it was holden, that although the statute avoided the security of the rent-charge upon the living, yet it did not affect the personal covenant.

So though a bill of sale for transferring the property in a ship, by way of mortgage, may be void^a, as such, for not reciting the certificate of registry, as required by stat. 26 G. 3. c. 60., s. 17., yet the mortgagee may be sued on a collateral covenant, for the payment of the money contained in the same deed.

In like manner, although a covenant by the lessee for payment of the property tax, and for indemnifying the landlord from it, is void by stat. 46 Geo. 3. c. 15. 193.; yet that will not avoid other independent covenants in the lease, such as the covenant for the payment of rent^b.

Where A. covenants not to do an act^c, which it was then lawful to do, and a subsequent statute compels him to do such act, this statute extinguishes the covenant; but if A. covenants to do an act then unlawful, and a subsequent statute makes it lawful to do the act, the covenant is not extinguished.

The assignee of a void lease cannot maintain an action for a breach of any of the covenants contained in the lease:

Tenant in tail demised land for 99 years^d, and covenanted for himself and his executors for the quiet enjoyment of the lessee. The tenant in tail died without issue. Soon after his death the lessee assigned to the plaintiff, who entered, but shortly after was ejected by the remainder man, whereupon the plaintiff brought an action against the executors of the tenant in tail for a breach of the covenant; but

^m *Wiggs v. Leake*, 2 T. R. 411.

ⁿ *Kerrison v. Cole*, 9 East, 231.

^o *Cushell v. King*, 11 East, 165. ^{vo}

^a *Coignized in Wiggs v. Shuttleworth*,

13 East, 87. See also *Fuller v. Abbott*, 4 Taunt. 105.

^d *Dyer*, 27. pl. 27. ^{Salk} 199.

^e *Andrew v. Pearu*, 1 Bos. and Pul. N. H. 158.

it was holden, that it would not lie; for the lease being void at the time of assignment, no interest passed under it.

In covenant^r, the plaintiff declared, that by deed made between her *as attorney for I. S.* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted (not saying with the plaintiff) to pay the rent to I. S., and then assigned a breach in non-payment of rent, to the damage of the plaintiff (the attorney). On demurrer, it was objected that the lease was void, and that an action could not be maintained upon it, especially by the plaintiff, who was the attorney only, and to whom the rent was not reserved; neither was there any covenant *with the plaintiff*, the words being general, *that he covenanted to pay the rent to I. S.*; that the power was not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal^s. The court gave judgment for the defendant, observing that in a good lease the rent might be reserved to a stranger who was not a party to the deed, but not in the present case where the deed was void; that the deed being void, so as not to pass any interest in the land, it was but just that it should be void as to the reservation of rent, especially where the covenant was not *with the plaintiff*, and where the rent was not reserved to her.

5. Of the Covenant not to assign without Licence.

A covenant not to assign or under-let without licence of the lessor, with a clause of re-entry in case of breach, is frequently introduced into leases, for the purpose of securing to the lessor a responsible tenant in whom he can repose a confidence (20). It will be proper therefore to consider

^r *Frontin v. Small*, Str. 703.

^s 9 Rep. 76 b.

(20) In *Henderson v. Hay*, 3 Bro. Ch. Cas. 632. upon a bill filed for the specific performance of an agreement by a landlord to grant a lease of a public house, containing the *common and usual* covenants; Lord Thurlow, Ch. was of opinion, that though the covenant not to assign without licence might be a very usual one, where a brewer or vintner let a public house, that would not make it a *common* covenant; and declared, that the landlord was not entitled to have it inserted in the lease. In *Morgan v. Slaughter*, 1 Esp. N. P. C. 8. Lord Kenyon, C. J. held such a covenant to be a *fair and usual* covenant. But in *Church v. Brown*, 15 Ves.

the effect and operation of such covenant; what will amount to a breach of it, and what to a dispensation from it.

Lessee for years covenanted not to assign, transfer, or set over, or otherwise do or put away the lease of the premises thereby demised, or any part thereof, to any person, without the licence of the lessor in writing; it was holden, that an underlease was not a breach of this covenant.

But where the words of the covenant were, that the lessee would not set, let, or assign over the whole or part of the premises without leave; it was holden, that an underlease amounted to a breach. So where the proviso was, that the lease should be void, "if the lessee assigned or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term, without leave in writing;" it was holden, that the words included an underlease. And here it is to be observed, that a lease by the lessee for the whole term amounts to an assignment, although the rent be reserved to the lessee, and a power of re-entry given to him, and not to the reversioner (21). But if a day only be excepted out of the term, then it is an underlease.

If a lease contain a proviso, making it void if the lessee,

t *Cruces dem. Bugby v. Blencowe*,
a Wils. 224. 2 Bl. R. 766. 8. C.

y *Palmer v. Edwards*, Doug. 186. n.
z *Helford v. Hatch*, Doug. 182.

n *Roe d. Gregson v. Harrison*, 3 T. R.
426.

a *Roe d. Gregson v. Harrison*, 3 T. R.
425.

x *Doe d. Holland v. Worsey*, 1 Camp.
N. P. C. 20. Ellenborough, C. J.

538. 531., the opinion of Lord Thurlow was recognized by Lord Eldon, Chr., and in *Brown v. Ruban*, 15 Ves. 529. Sir W. Grant, M. R. held, that under an agreement for a lease "with usual covenants" the lessor was not entitled to this covenant against assigning or underletting without licence.

(21) In *Poultney v. Holmes*, 1 Str. 405. where the question was, whether a parol agreement by the lessee to transfer the remaining interest in a term of more than three years originally, when there was only a year and a half to run, reserving the rent to himself, and not to the reversioner, was void within the meaning of the statute of frauds, Pratt, C. J. ruled *in Nisi Prius*, that this must be taken as a lease, and not as an assignment; because the rent was reserved to the lessee. It is observable that when this case was cited in *Palmer v. Edwards*, Buller, J. said, that it did not come up to that case; for *Poultney v. Holmes* only determined, that what could not be supported as an assignment should be good as an underlease.

his executors, or administrators, alien without licence in writing, a *voluntary* assignment by the executor or administrator, without such leave, will amount to a forfeiture (22).

An assignment by operation of law will not amount to a forfeiture:

This point was decided for the first time in *Doe d. Mit- chinson v. Carter*, 8 T. R. 57. where it was holden, that an assignment to a person purchasing the term from the sheriff under a *bona fide* execution, would not amount to a forfeiture (23).

(22) In *Seers v. Hind*, 1 Ves. Jun. 295. one of the questions was, whether executors were warranted in disposing of a lease as assets of the testator, where there was a proviso against alienation by the *lessee*. Lord Thurlow, Ch. said, "If A. lets a farm to B., with a covenant not to alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A., it goes to his executors, not by way of limitation, as in the case of a remainder over, &c., but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide, that in case of a devolution to executors, it shall not be alienable by them; but, it must be very special for that purpose."

(23) It seems that the same rule would hold in the case of an assignment under a commission of bankrupt: and of this opinion was Lord Macclesfield, in *Goring v. Warner*, 2 Eq. Cas. Abr. 100. and 7 Vin. 85. pl. 9. conceiving that an assignment of this kind, being by virtue of a statute, was not within the terms of the covenant, which extended only to the act of the party. So Lord Hardwicke, Ch. in *Philpot v. Hoare*, Amb. 480. expressed an opinion, that a covenant by a lessee not to assign without licence, did not bind the assignee of the lessee under a commission of bankrupt, if the assignment was not fraudulent. See also 3 Wils. 237. and *Fox v. Swan*, Sty. 483. And *Doe v. Bevan*, 3 M. and S. 353. where this point was expressly determined.

It appears from the preceding opinions, that a mere covenant not to assign without licence in writing, is not sufficient to protect the interests of the lessor in all events, and therefore cautious landlords cause a special proviso, to be inserted in their leases, providing against the consequences of a bankruptcy. The form of this proviso may be seen in *Doe d. Hunter v. Galliers*, 2 T. R. 133. where the validity of a covenant of this kind was called in question, the

But where the execution is in fraud of the covenant^b, the assignment under it will amount to a forfeiture, and the lessor may re-enter; as where the lessee gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment.

Under a covenant not to alien without leave, if leave is once granted, the covenant is entirely discharged:

Corpus Christi College in Oxford^c, demised land for a term of years to A., with a condition, that neither A. or his assigns should alien the land without the special licence of the lessors; afterwards the lessors, by writing under seal, licensed A. to alien the land to any person, and A. afterwards assigned the term to B.: after B.'s death, C. became entitled to the term, and assigned it to the defendant Syma. The lessors entered for condition broken. It was resolved by the court, that the alienation by licence to B. had determined the condition as to the assignees; and that it was not in the power of the lessors to dispense with an alienation for one time, and yet to consider the estate aliened or demised as afterwards remaining subject to the condition; for a condition is to be taken strictly, and by the alienation with licence it is satisfied.

So in the case of a demise to A., B., and C.^d, with a like condition, if a licence to alien be granted to A., and A. aliens by virtue of such licence, the condition is determined as to B. and C. (24).

b Doe d. *Mitchinson v. Carter*, 8 T. R. 300.

c *Dumpey v. Syma*, 4 Rep. 119 b. Cro. Eliz. 315. 1 Roll. Abr. 471. (G.) pl.

1. S. C. See the record of special verdict, Co. Ent. 694 b. pl. 22

d *Leeds and Crompton* adjudged; cited in 4 Rep. 120. a. 1 Roll. Abr. 472. (G.) pl. 7. S. C.

court however decided in favour of it. But N. if standing timber be sold to a trader with a proviso in case of bankruptcy, that the vendor shall retake it, such proviso is void. *Holroyd v. Gwynne*, 2 Taunt. 176.

See also *Doe v. Clarke*, 8 East, 185, where a term for years in a house was made to continue and depend on the personal occupation of the lessee; the lessee, having become a bankrupt, ceased to live in the house in consequence of his assignees having sold it, it was holden, that there was an end of the bankrupt's interest in the premises, and that the lease was determined.

(24) So in the case of a demise, upon condition that the lessee shall not alien the land or any part thereof without the assent of

Lessee covenanted that he, his executors, or administrators, would not demise, &c. the premises without licence; the lessee became a bankrupt; his assignees took to the lease, and assigned it to A. who assigned it to the original lessee, who underlet to B.; it was holden that the covenant of the lessee was discharged by 49 Geo. 3. c. 121, s. 19; and consequently that the subsequent underletting by the lessee was no breach of that covenant, which no longer existed^a.

Whether the licence to assign be general, as in the preceding case of *Dumper v. Syme*, or particular as "to one particular person", subject to the performance of the covenants in the original lease," yet the condition is gone, and the assignee may assign without a licence. But where there is an exception out of the original restriction to alienate in favour of an assignment by will, and an assignment is made by the lessee by will; and then his executors make another assignment, and not by will, it seems that this last assignment is bad^b.

It is to be observed, that acceptance by the lessor of rent due after condition broken *with notice*, is a waiver of the forfeiture^b.

A court of equity will not relieve against a forfeiture occasioned by breach of this covenant^c.

6. Of the Covenant for quiet Enjoyment.

A general covenant for quiet enjoyment does not extend to tortious entries by a stranger^d. This opinion prevailed at an early period of our law, for in the year book 26 H. 8. 3 b. we find the following case: A man made a lease for years by indenture, and by a clause in that lease covenanted to warrant the demised premises during the term of the lessee; afterwards

e *Doe d. Cheere v. Smith*, 5 Taunt. 795.

f *Brummell v. Macpherson*, 14 Ves. 173. Eldon, Ch.

g *Lloyd v. Crispe*, 5 Taunt. 249.

h *Goodright d. Walter v. David*,

Cowp. 804. *Whichcot v. Fox*, Cro. Jac. 394.

i 15 Ves. 63.

k *Davie v. Sacheverrell*, adjudged on demurrer. 1 Roll. Abr. Condition, (V) pl. 7. *Hayes v. Bickerstaff*, 8. 21 Car. 2. Vaugh. 119.

the lessor, and afterwards the lessee aliens part, with the assent of the lessor, the lessee may alien the residue without such assent, per Popham, C. J. 4 Rep. 120. a. who denied the contrary position, (though adjudged in *Dyer*, 334 b. pl. 32.) to be law.

the lessee was ousted by one who had not any right to the premises; and the question was, whether the lessee should have writ of covenant against the lessor or not? and Englefield, J. said, "The lessee shall not have writ of covenant against his lessor where he is ousted by wrong; for he may have writ of trespass or *ejectionis firme* against him who ousted him; but if he was ousted by one who had title paramount against him, as in that case he cannot have any remedy [against the person ousting him,] he may have writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors.*" (25).

The doctrine laid down in the foregoing case is not confined to covenants in leases for years, for in *Dudley v. Folliott*, B. R. E. 30 Geo. 3. 3 T. R. 584. it was adjudged, that a general covenant in a conveyance of lands in fee, that the grantor had legal title, and that the grantee might peaceably enjoy the premises without the interruption of the grantor and his heirs, or any other person, did not extend to the acts of wrong doers; but only to the acts of persons claiming by a legal title.

The distinction taken in these cases illustrates the reason of the following rule, viz. that in actions for breach of a general covenant for quiet enjoyment, it is essentially necessary, that it should appear on the face of the declaration, that the eviction was made by a person claiming by a legal title. In *Tisdale v. Sir W. Essex*, Hob. 34. in an action on a covenant in a lease for years, for enjoyment during the term, the breach assigned was, that one H. Elsing entered upon the plaintiff and ejected him. The question, on demurrer was, whether the ejectment by Elsing being taken to be by wrong, because no title was laid in him, should be adjudged a breach of covenant; the court was of opinion that it should not be so adjudged (26).

(25) See also 22 H. 6. 52 b. pl. 26. 26 H. 8. 3. b. pl. 11. F. N. B. 342. ed. 4to. to the same effect.

(26) The following abridgment of the record, in *Tisdale v. Essex*, is taken from *Winch's Entries*, 119, ed. 1680. "Count upon indenture of articles brought by Tisdale against Essex, in which defendant covenanted that the plaintiff should enjoy certain lands for seven years, from such a day, and that he should quietly remove such edifices as should be erected during the term, within three months after the expiration of the term, and that defendant would make plaintiff a good lease, or some security for the quiet enjoyment of the premises, and thereupon the plaintiff covenanted

From the following cases it may be collected in what manner the averment of title in the party evicting ought to be made, in assigning the breach of covenant.

In an action on a covenant¹ in a lease for quiet enjoyment the breach assigned was, that *at the time of the demise* to the plaintiff, one J. B. Pierson had lawful right and title to the premises, and *having such lawful right and title, entered and ejected* plaintiff. On special demurrer to the declaration, it was objected, that the plaintiff, in alleging the eviction, ought to have shewn the title of J. B. Pierson, or at least, it should have been averred, that J. B. Pierson had such a title as was inconsistent with the plaintiff's title to possess these premises; that though it was alleged, that J. B. P. had lawful right and title to the premises, he might only have had a title to recover in a real action, and not a right of entry; and that the mischief to be apprehended from this loose mode of pleading was, that it might give a cover to an eviction by collusion (27). The court overruled the objections, and gave judgment for the plaintiff; Lord Kenyon, C. J. observing, that if the declaration was certain to a common intent, it was sufficient; that it would be doing violence to the words to say, that the lawful right and title, which it was stated J. B. P. had, did not legalize his entry; that the fair import of the words was, that he had lawful right and title to do that which he did. Buller, J. said, that when it was stated "that the party having a lawful right and title entered," it was the same

1 Foster v. Pierson, 4 T. R. 617.

to pay defendant a certain rent, and that he would deliver up possession to the plaintiff at the end of the term. Averment, that he entered on such a day and became possessed, and assigns for breach, that one Elsing ejected him. Demurrer. Joinder." To the record, which is stated at length in Winch's Entries, Winch has subjoined the following note: "In this case two points were moved.—The one, if it were a lease for seven years.—2. If there was a good breach assigned.—My opinion and that of my brother Nycholls, was, that it was a good lease. Warburton e contra. On the second point, Warburton and Jones held, that there was not any breach assigned. Nycholls e contra."—(Winch has not mentioned what his own opinion on the second point was; but he concludes the note with stating, that Hobart, C. J. was of opinion with him in both points, and judgment was given against the plaintiff.)

(27) Another objection was taken, viz. that it was not stated, that the plaintiff was evicted by legal process; but this objection was abandoned, the precedents being against it.

as saying, "He entered by lawful right and title." In the preceding case the objection "that the title of the party evicting was not *particularly* set forth," was not pressed upon the court; but in *Hodgson v. the East India Company*, 3 T. R. 278. this objection recurred, and the attention of the court was directed to it; but it was overruled, notwithstanding a contrary decision on error in the Exchequer Chamber, in *White v. Ewer*, Cro. Eliz. 823.; and Lord Kenyon, C. J. delivering the opinion of the court, said, that to compel the plaintiff to set forth the particulars of the title of the person who entered on him; would impose insuperable difficulties on him; for the knowledge of those particulars could not be acquired, except by an inspection of title deeds, to which plaintiff could not have any access. It must be observed, however, that although it be not necessary to set forth the particulars of the title of the party evicting, yet room must not be left for any intendment, that such title is derived from the plaintiff; for where defendant^m by *fine sur concessit* granted certain lands to plaintiff for years, and warranted the same against all men during the term; in an action of covenant on this warranty, the breach assigned was, that one S., after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected plaintiff; defendant tendered issue on the ejectment: after verdict for plaintiff, it was moved in arrest of judgment, that the breach was not well assigned; because S. might have had, at the time of his entry, a lawful right and title to the premises under the plaintiff himself; and as it was not stated in the declaration, that S. had title to the premises *before* the fine was levied, it should be intended, that he had a right to the premises, at the time of his entry, by a puisne title, to which the covenant of defendant did not extend. The court (*absente* Kelynge, C. J.) held that the breach was not well assigned.

So in an action against executorsⁿ (in their own right) who had assigned a lease belonging to their testator by way of mortgage, and had covenanted for good title and quiet enjoyment of the plaintiff, without disturbance from them or any other person; the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment, by one Yates, *having lawful title to the premises*. On special demurrer it was objected, that it did not appear that Yates's title commenced by any act of the defendants, or prior to the assignment made by them to the plaintiff, who might there-

^m *Wotton v. Hele*, 2 Saund. 177.

ⁿ *Noble v. King and Smith*, 1 H. Bl. 24.

fore have been evicted by means of some act done *by himself* since the assignment. Judgment for the defendants.

This intendment, viz. that the title of the party evicting was derived from plaintiff, may be precluded by averring, (if the facts of the case warrant such an averment) that the person evicting entered by lawful title, which accrued to him *before* the date of the conveyance to the plaintiff (28), as in *Buckly v. Williams*, 3 Lev. 325. Covenant upon articles, whereby defendant covenanted that plaintiff should quietly enjoy a close, and that one Knolls (who had a title to the premises by virtue of a certain lease to him thereof, made *before the making of the articles aforesaid*,) entered upon the plaintiff and expelled him. After verdict for plaintiff, it was moved, in arrest of judgment, that the breach was not well assigned; because plaintiff did not shew what title Knolls had; and, perhaps, the title which he had was under the plaintiff; but the objection was overruled; for the title of Knolls could not be supposed to be under the plaintiff; for the declaration states, that Knolls had a title by virtue of a demise made to him *before* the making of the articles to the plaintiff, and let the title be derived from whom it will, yet being before the articles made with the plaintiff, the covenant is broken.

The preceding remarks have been confined to the cases of general covenants and evictions by strangers; but in cases where the covenant is particular, as against interruption by the grantor or lessor, or by any person expressly named, upon the eviction of the covenantee by the grantor or lessor, or by the person expressly named, it is not necessary for the plaintiff to aver title in the party evicting.

In covenant^o, the declaration stated that the defendant granted a messuage, with the appurtenances, to plaintiff in fee, and covenanted for plaintiff's quiet enjoyment thereof, without the lawful let, entry, eviction, or interruption of the defendant; and assigned for breach, that defendant hindered plaintiff in

o *Lloyd v. Tomlins*, 1 T. R. 671

(28) Or by averring that at the time of the demise to the plaintiff, the party evicting had lawful title; as was done in *Foster v. Pierson*, 4 T. R. 617. and ante p. 455, or that the party evicting entered by virtue of a title theretofore made, *by, from, and under the defendant*, as was done in *Hodgson v. India Company*, 8 T. R. 278. But merely averring that J. S. entered *claiming* title from the defendant, is not sufficient, *Aleyn*, 38. *Eeles v. Lambert*.

the enjoyment of a pew appurtenant to the messuage; on general demurrer it was objected, that the injury complained of ought to be the subject of an action of trespass, but could not be the foundation of this action, the covenant being against all lawful disturbance: to this it was answered, that, where the breach complained of was the act of the covenantor, any interruption was sufficient to support this action against him. Judgment for the plaintiff; Ashhurst, J. observing, that it was not necessary that the party against whom the action was brought should *have a title*; it was sufficient if he did the act *under a claim* of title; that in this case the act itself asserted a title; for the defendant locked up the pew, which was as strong an assertion of right as could well be imagined.

So where, in covenant, the plaintiff set forth a covenant which recited that defendant had sold, to the plaintiff's testator, goods which had been seized by one Bell, and therefore defendant covenanted to plaintiff's testator, to save him harmless from any costs or damages relating to such seizure, and then assigned for breach, that the said Bell, having seized the goods *under pretence* of a debt due from defendant to him, touching which seizure testator was put to great expense, which defendant neglected to pay. It was objected, that the covenant did not extend to tortious acts, for which the plaintiff had a remedy, and therefore the title of Edward Bell ought to have been set forth; that "having lawful title" was not sufficient; that here it was only said "under pretence," which was not so strong. The counsel, for the plaintiff admitted it to be a general rule, that the plaintiff must shew a title in the disturber; but insisted that that rule extended only to the case of a general covenant, and not where it was particular against the acts of particular persons; for in that case it comprehended even tortious acts. And by the court: This pretence of Bell's being recited in the covenant, shews it was meant as a security against it in all events; and though it should be tortious, yet being particular, it falls within the distinction that has been well taken. Adjourned, and Hil. T. following, judgment for plaintiff, defendant's counsel declining to argue it.

IV. *By whom the Action of Covenant may be maintained,*

1. *Heir.*
2. *Executor.*
3. *Assignee.*

1. *By Heir.*—COVENANTS which run with the land will descend to the heir of the covenantee; and he may sue for a breach thereof; as where the lessee covenanted with the lessor^q, his executors, and administrators, to repair; it was holden, that the heir of the lessor, though not named, might have covenant against lessee for not repairing.

Plaintiff declared as heir on a covenant by lessee for years to repair^r, and assigned for breach, that the premises were out of repair for a period of time which included a portion of his ancestor's life; and on this ground an exception was taken in arrest of judgment, after verdict for the plaintiff; but it was overruled, Holt, C. J. observing, that if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir; and the jury give as much in damages as would put the premises in repair, respect being had, not to the length of time they continued in decay, but to what it will cost *at the time of action brought*, to put the premises in repair.

Upon a covenant with A. and his heirs to do all lawful and reasonable acts for further assurance upon request, and a request made by the ancestor in his life to levy a fine, and neglect so to do, the ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of the ancestor, and refusal made to him; because the ultimate damage had not accrued in the life of the ancestor^s.

2. *By Executor.*—A. and B. his wife, by indenture, demised lands to C. for 21 years, and thereby covenanted, that they (viz.) A. and B. would at the end of the 21 years make a good lease to C. and his assigns for 21 years^t, commencing at the expiration of the first term. During the first term the lessee died, having made his will, and appointed D. his executrix, who entered, &c. and died, having made her will and

^q *Longher v. Williams*, 2 Lev. 92. ^s *King v. Jones and another*, 5 Taunt. Skin. 305.

^r *Vivion v. Champion*, Salk. 141.

^t *Chapman v. Dalton*, Plowd. 294 a.

appointed the plaintiff her executor, who entered, &c. At the expiration of the first term, A. and B. having refused to grant the farther lease, an action was brought by the plaintiff (as executor of D. executrix of C. the lessee) on this covenant against A. the husband; and it was adjudged that the action would well lie (29).

Covenant by the plaintiff as executor of J. S.^a. The defendant sold lands to J. S. and covenanted with him, his heirs, and assigns, that he should enjoy the lands against all persons claiming under one A.; and the breach assigned was, that B. and C., in the life-time of the testator, entered claiming under A. On demurrer to defendant's plea, it was contended, for the defendant, that the covenant was with J. S., his heirs, and assigns, touching an estate of inheritance; and therefore, that the action ought to have been brought by the heir or assignee, and not by the executor: but it was resolved by the court, that the eviction being to the testator in his life-time, he could not then have an heir or assignee of this land, and therefore the damages belonged to the executor, though not named in the covenant; for he represented the person of the testator.

But where the plaintiff as executrix declared that the defendant, by deed, conveying to plaintiff's testator certain land in fee, subject to redemption on payment of a sum certain, covenanted with the testator, his heirs and assigns, that he was at the time of the execution of the deed seised in fee, and had a right to convey, &c. and assigned for breach that the defendant was not seised, &c. and had not a right to convey, &c. it was holden, that the executrix could not maintain this action without shewing some special damage to the testator in his life time, or that the plaintiff claimed some interest in the premises². But the plaintiff being devisee in fee sued afterwards in that character, stating as damage, that the premises were thereby of much less value than they would have been, and that she had been prevented from selling them at so large a price as she otherwise would, and it was holden³ that the action was maintainable.

^a *Lucy v. Livingston*, 9 Lev. 26.
¹ Vent. 178. S. C.

^x *Kingdon v. Nottle*, E. 53. G. 3.
B. R. on special dem. 1 Maule and Selwyn, 355. cited by Heath, J. de-

ivering judgment of court in *King v. Jones*, 5 Taunt. 418.

^y *Kingdon v. Nottle*, B. R. E 56 G. 3. 4 M. & S.

(29) The reasons of the judgment are not mentioned in the report; but it appears to have been decided on the ground that the plaintiff, being executor of D. who was executrix of C. the lessee, was as such entitled to the benefit of his covenant.

3. *By Assignee*.—Assignee of part of the reversion of all the land demised^a, may take advantage of the covenants contained in an indenture of demise; for he is an assignee within the stat. 32 H. 8. c. 34.

As the assignee of a term is bound by covenants which run with the land, so may he take advantage of them^b.

If a man demise or grant land to a woman for years^b, and the lessor covenant with the lessee to repair the houses during the term, the woman takes husband, and dies, the husband shall have an action of covenant as well on the covenant in law upon the words "demise or grant," as upon the express covenant. The law is the same with respect to tenant by statute merchant, or statute staple or elegit, of a term, and with respect to him to whom a lease for years is sold by force of any execution, who shall have an action of covenant in the like case as a thing annexed to the land, although they come to the term by act of law.

So the executor of B^c, the executor of A. is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A. N. The word *assignee*, comprehends the assignee of the assignee, the executors of the assignee of the assignee^d, and the assignee of the executor or administrator of the assignee.

Stat. 32. H. 8. c. 34.—The stat. 32 H. 8. c. 34. after reciting, that many temporal and religious persons had made leases and grants of land for life or lives, or for term of years, by writing under seal, containing conditions and covenants to be performed as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and that by the common law no stranger to any covenant could take advantage thereof, but only such persons as were parties or privies thereunto; by reason whereof grantees of reversions, and grantees and patentees of lands lately belonging to religious houses, were excluded from any entry or action against the lessors and grantees, their executors and assigns, for breach of any condition or covenant, enacts, "that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, of any lands or other hereditaments, or of any reversion of the same, which belonged to any of the monasteries, &c. dissolved, or by any other

z 1 Inst. 215 a.

a Cro. Eliz. 552.

b Spencer's case, 5 Rep. 17. a 5 .
solution

c Chapman v. Dalton, Plowd. 284. a.
note, p. 459.

d Spencer's case, 5 Rep. 17. b.

" means come to the king's hands, since the 4th day of February, A. D. 1535, or which at any time before the passing this act belonged to any other person, and after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by (30) any other person than the king, and their heirs, executors (31), successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture (32), and by action only for not performing other conditions, covenants, or agreements expressed in the indentures of leases and grants, against the said lessees (33) and grantees, their executors, administrators, and assigns, as the said lessors and grantors, their heirs or successors, might have had. By s. 2. all lessees and grantees of lands or other hereditaments for term of years, life, or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any

(30) It seems to have been the opinion of the court in Lee and Arnold's case, 4 Leo. 29. that the bargain of a reversion, by bargain and sale, indented and enrolled, was an assignee within this statute, though he hath but an use by the act of the party, and the possession by stat. 27 H. 8.

(31) In respect of this word, it hath been holden, that an assignee of part of the reversion, as an assignee of the reversion for years, of all the estate demised, may enter for condition broken. *Mathes v. Westwood*, B. R. H. 40 Eliz. Cro. Eliz. 599, 600. 617. Moor, 527. B. C. 1 Inst. 215. a. But the grantee of the whole estate in reversion in part of the thing demised, is not within the meaning of the statute, as if the reversioner in fee of 4 acres grants 2 acres in fee, the grantee cannot enter, because conditions cannot be apportioned by act of the party, 4 Leo. 27.

(32) Although the words of the statute be for non-payment of the rent, or for doing of waste or other forfeiture, yet the grantees or assignees shall not take advantage of every forfeiture by force of a condition, but of such conditions only, as either are incident to the reversion, as rent; or for the benefit of the estate, as for keeping the house in repair, for making fences, scouring ditches, preserving woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like. 1 Inst. 215. b. Moor, 876. pl. 1228.

(33) This statute does not extend to covenants upon estates tail. 1 Inst. 215. a. See also the preamble.

" other persons, of the reversion of the same lands and hereditaments so letten, or any parcel thereof, for any condition or covenant, expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors."

The first section of the preceding statute gives to the assignee of the reversion two remedies, one, by entry for non-payment of rent, doing waste, or other forfeiture; and the other, by action, for not performing other conditions, &c.; and as the remedy by entry, according to the construction made by Sir Edward Coke, 1 Inst. 215. b. is confined to forfeitures by force of such conditions, as either are incident to the reversion, or for the benefit of the estate; so it hath been resolved^e, that the remedy by action is confined to the breaches of such covenants, as relate to the thing demised, and not to collateral covenants. And on this ground, where the mortgagor and mortgagee of a term made an under-lease^f, in which the covenants for the rent and repairs were with the mortgagor and his assigns only; it was holden, that the assignee of the mortgagee could not maintain an action for the breach of these covenants; because they were not covenants running with the land, but collateral covenants, being entered into with a stranger to the land; that is the mortgagor, who had only an equity of redemption. If the estate in reversion^g, in respect of which the condition or covenant was made, be extinguished, the condition or covenant is also extinguished: As where a lease was made for 100 years, and the lessee made an under-lease for 20 years, rendering rent, with a clause of re-entry; and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was holden, that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term to which they were incident, was extinguished in the reversion in fee (34).

Tenants in common of a reversion may maintain covenant against the assignee of the term for the recovery of arrears of rent, although it should appear, that at the time of action

^e Spencer's case, 5 Rep. 18. a.
^f Webb v. Russell, 3 T. 3. 409, 3.
^g Moore, 94, pl. 232. recognized by

Kenyon, C. J. delivering the opinion of the court in Webb v. Russell, 3 T. R. 402, 3.

(34) " He who enters for condition broken must be in of the same estate, which he had at the time of the condition created."
 4 Rep. 120. b.

brought the reversion was out of the plaintiffs, they having granted it over, after the rent became due^k.

N. In *Glover v. Cope*^l, B. R. Pasch. 3 W. and M. Carth. 205. it was adjudged, after two solemn arguments, by Holt, C. J. and the court, that the grantee of the reversion of copyhold lands was within the intention and equity of the preceding statute, which is a remedial law, and of great and universal use, and absolutely necessary as well for copyholders as others; and that by this construction of the statute the lords of copyhold manors could not be injured.

A remainder-man is an assignee of the reversion within this statute: Devise to A. for life, remainder to B. for life, &c. with power to make leases for 21 years; A. leases for 14 years, by indenture, in which lessee covenants with lessor, his heirs and assigns, for payment of the rent to lessor, and such other person as should be entitled to the freehold, &c. A. dies pending the term, and after the death of A. rent becoming in arrear, B. brings covenant^k; held that it would lie, for B. is, within the meaning of the statute, an assignee of the reversion of that estate out of which the lease is granted.

Lessee for years assigns over his term by indenture to J. S.^l, and in the same deed he covenants that J. S. and his assigns shall enjoy the land during the term without interruption from any person; after which J. S. assigns over the term by parol, and the assignee, being disturbed brought an action of covenant; and adjudged, that it well lies; although the assignment was not by writing (35) because the assignee was privy in estate.

A person to whom an apprentice is assigned according to the custom of the city of London,^m cannot maintain covenant on the indenture of apprenticeship to which he is not a party; because custom cannot make an assignee, so as to entitle him to an action.

h *Midgley and another v. Lovelace*, 1 Avder v. Nokes, Cro. Eliz. 436. reversed. 29 Mod. 45. S. C.

i 3 Lev. 336. Skiu. 305. S. C.

k *Isherwood v. Oldknow*, 3 M. and S. 392.

l *Advised and briefly stated in 3 Rep. 63. a.*

m *Barker v. Beardwell*, 1 Show. 4.

(35) But now by stat. 29 Car. 2. c. 3. s. 3. leases, estates, or interests, either of freehold, terms of years, or uncertain interest, cannot be assigned, unless by deed or note in writing, signed by the assignor or his agent, or by operation of law.

V. *Against whom the Action of Covenant may be maintained,*

1. *Heir.*
2. *Executor.*
3. *Assignee.*

1. *Against Heir.*—An action of covenant will lie against the heir on a covenant by his ancestor for himself and his heirs (30), as well as an action of debt will lie against the heir on a bond, wherein the ancestor has bound himself and his heirs^a.

It is not necessary to allege in the declaration, that the heir has lands by descent (37).

In an action on a breach of covenant in a lease for quiet enjoyment, the declaration, after stating that defendant's ancestors granted the lease in question, alleged, that the reversion vested in the defendant *by assignment*; defendant, by guardian, pleaded, that the reversion did not vest in him *modo et formâ*: it appeared in evidence, that the estate descended to the defendant, an infant, as heir at law to the lessors^b: whereupon it was objected, that the reversion vested in the defendant *by descent*, and not *by assignment*; and that if the declaration had charged the defendant as heir, he might have prayed the parol to demur, in order that he might have an opportunity of electing whether he would take the estate subject to the incumbrance or not. But the court was of opinion, that if the defendant had intended to avail himself of his infancy, he ought to have pleaded it; that it was sufficient to prove the substance of the issue, which was, that defendant was clothed with such a character as would make him liable to the covenant; and that was sufficiently proved

^a *Dyke v. Sweeting*, Willes, 585. ^b *Densley v. Custance*, 4 T. R. 75.

(36) See the form of declaration. *Gifford v. Young*, Lutw. 287.

(37) It seems, however, that, in this case, as well as in debt on bond against the heir, if the heir has not any lands by descent, he may insist on it by way of defence to the action. See the form of plea of *riens per descent* to an action of covenant against heir. Lutw. 290.

by shewing that the estate was vested in him; for whether he was *in possession as assignee* or heir at law, he was equally liable to this covenant.

2. *Against Executor*.—Executors and administrators are bound by the covenants of their testator or intestate, although they be not named; unless the covenants are such, as in their nature determine by the death of the covenantor (38).

Executors and administrators may be sued as assignees^p for they are assignees in law of the interest of the term^q.

Where covenant is brought against an executor^r; although the breach assigned be for default of reparation committed in the time of the testator, yet the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executor as representing him, and therefore he must be sued by that name.

Covenant by testator to teach an apprentice his trade is binding on the executors^s, and they ought to see that the apprentice is taught his trade; and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant.

3. *Against Assignee*.—1. If the covenant extends to a thing in esse parcel of the demise, as a covenant to repair^t; to reside constantly on the demised premises^u; to leave part of the land demised every year for pasture^x, or the like, the thing to be done by force of the covenant, is in a manner annexed and appurtenant to the thing demised; it is parcel of the contract, and tends to the support of the thing demised; hence it shall bind the assignee, *although he be not named*; and the assignee by act in law, as tenant by elegit of a term, or he to whom a lease for years is sold by force of any execution, is equally bound with the assignee by act of the party^y.

2. If the covenant relates to a thing *not* in esse at the time

p *Tilley v. Norris*, 14 W. 3. B. R. 319. 1 Ld Raym. 453. Salk. 369. B. C.

q Per Fleming, C. J. 1 Bulstr. 93.

r *Collins v. Throughgood*, Hob. 188.

s *Walker v. Hull*, 1 Lev. 177. Sed quæ.

t *Dean and Chapter of Windsor's case*, 5 Rep. 94 a.

u *Tatem v. Chaplin*, 2 H. Bl. 133.

x *Cockson v. Cock*, Cro. Jac. 125.

y 6th Resolution. *Spencer's case*, 5 Rep. 17 b.

(38) It was said by the court in *Hyde v. Dean of Windsor*, Cro. Eliz. 553. that covenant lies against an executor in every case, although he be not named, unless it be such a covenant, as is to be performed by the person of the testator, which the executor cannot perform.

of the demise, but to be done upon the thing demised, as a covenant to build a new wall upon the land demised; it shall bind the assignee, *if named*.

3. If the covenant relates to a thing merely collateral to and not in any respect concerning the thing demised^a, as a covenant to build a house on the land of the lessor, which is not parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger^a; the assignee, *though named*, is not bound by such covenant; because the thing covenanted to be done is merely collateral, and not in any respect touching or concerning the thing demised (39).

In order to bind the assignee, even though named, it is essentially necessary, that the thing covenanted to be done, or not to be done, should directly affect the nature, quality, or value of the thing demised, or the mode of occupying it. Hence, where in a lease of land^b, with liberty to make a water-course, and erect a mill, the lessee covenanted for himself and his assigns, not to hire persons to work in the mill, who were settled in other parishes, without a certificate of their settlement: it was holden, that this covenant was not binding on the assignee of the term; because the state of the thing demised would be the same at the end of the term, whether the parish were more or less burdened with poor, and although the value of the reversion would not be so great if the poor's rate were increased, yet that burden would be increased by a collateral circumstance; and the work to be done being the same, whether it were done by workmen from one parish or another, could not affect the mode of occupation.

4. If a covenant relates to personal goods^c, as on a demise of sheep for a certain time, if the lessee covenants for himself and his assigns to re-deliver the sheep at the end of the time, and the lessee assign the sheep over, this covenant (40)

^a Spencer's case, and Resolution.

^a Mayo v. Buckhurst, Cro. Jac. 438.

^b Mayor of Congleton v. Pattison, B.

R. Triu 48 G. 3 10 East, 380.

^c Spencer's case, 3d Resolution.

(39) It is a substantive, independent agreement, not *quodam modo*, but *nullo modo* annexed or appurtenant to the thing leased. Per Wilmot, C. J. delivering the opinion of the court in Bully v. Wells, Wilmot, 345.

(40) "The covenant in this case is not collateral, but the parties, that is, the lessor and assignee, are total strangers to each other, without any line or thread to unite and tie them together, and to constitute that privity, which must subsist between debtor and

will not bind the assignee, *though named*; because there is not any privity. In the case of realty there subsists a privity between the lessor and the lessee, and his assigns, in respect of the reversion, but in the case of lease of personal goods, there is not any reversion, but merely a chose in action in the personalty, which cannot bind any but the covenantor, or his personal representative (41).

A lessee of tithes covenanted for himself^d, his executors, administrators, and assigns, not to let any of the farmers occupying the estate out of which the tithes arose, have any part of the tithes without the consent of the lessor; and further covenanted for himself and his assigns to find and allow to the lessor sufficient wheat straw for thatching any of the buildings then in lessor's occupation: the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent. An action having been brought against the defendant for this breach of the covenant, and a verdict for the plaintiff, it was moved in arrest of judgment, that the action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral, binding the lessee only; that tithes were incorporeal, lying in grant, and which therefore would not endure such an annexation of covenant. But the court were of opinion, that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, materially and essentially tending to preserve it, and as such, obligatory on the assignee, being named, and there being a privity in respect of the reversioner, the lessor.

Covenant by lessee against the assignees of lessor*. The

^d Bally v. Wells, M. 20 G. 3. C. B.
3 Wils. 25. Wilmut, 341. S. C.

^e Gray v. Cuthbertson and another
assignees of Mills, T. 25 G. 3. B. R.
MSS.

creditor to support an action." Wilmut, C. J. in Bally v. Wells, Wilmut, 345.

(41) "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, *he must in all cases be named*, and there must also be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect the thing leased. The chose in action, which of itself is not assignable, loses that property under those circumstances, and in a waiting dependent state follows its principal; and assignees of leases become liable to assignees of reversions, and *vice versa*." Per Wilmut, C. J. ib. 345.

lessee covenanted to leave all the trees he should plant during the term. The lessor covenanted for himself, his executors, and administrators, to pay for the trees at a fair valuation, by two persons to be named by each party, their executors, administrators, or assigns. The term expired. The defendants, assignees of lessor, refused to name an arbitrator, which was the breach assigned. On general demurrer to the declaration after argument, and time taken to consider, Lord Mansfield, C. J. delivered the opinion of the court, that the covenant to refer to arbitration did not run with the land; and therefore the assignees were not bound by it, on the authority of *Spencer's case*, the assignees not being named.

Where lands are conveyed by A. to B.^f, in fee, to the use of such person as C. shall appoint; and C. covenants for himself and his assigns to pay to A. a fee-farm rent for the lands, and afterwards C., in pursuance of his power, makes an appointment to D.; D., the appointee cannot be sued on the covenant as the assignee of C.; for the appointee has not the estate of C., but is in by the original conveyance.

A covenant which runs with the land^g, e. g. a covenant to repair, is divisible: and will bind the assignee of parcel of the estate demised, *quoad* the repairs of such parcel.

So where covenant was brought by the lessor against the assignee of the lessee for the non-payment of a year's rent^h. Defendant, as to the rentⁱ for half the year, pleaded an eviction during that time of a moiety of the premises by title paramount. On demurrer, the question was, whether the rent was apportionable: It was holden, that the condition of the assignee was different from that of the lessee who was chargeable on privity of contract; for the assignee was chargeable on the privity of the estate, and in respect of the land; hence the rent in question was apportionable; on the same principle as the rent of the lessee or assignee would have been, in an action of debt or replevin.

As the assignee of a term is chargeable only in respect of the thing demised^k, and on the privity of estate subsisting between him and the lessor, he is not answerable for breaches of covenant committed *before* he became assignee. Neither is he answerable for such breaches of covenant as are committed

^f *Roach v. Wadham*, 6 East's R. 239.

^g *Congham v. King*, 1 Rol. Abr. 522.

Sir William Jones, 245. S. C. Cro.

Car. 221. S. C. recognized by the

court in *Stevenson v. Lambard*,

2 East's R. 540.

^h *Stevenson v. Lambard*, B. R. T.

42 Geo. 3. 2 East's R. 575.

ⁱ This ought to have been pleaded to a moiety of the rent for half a year.

^k *Greco v. Green*, Salk. 199. *Churchwardens of St. Saviour's v. Smith*,

3 Burr. 1271. 1 Bl. R. 351. S. C.

after he has assigned over the thing demised¹, for if an action be brought against him, charging him with such breaches, he may plead, that before the breach was incurred, he assigned all his estate and interest in the thing demised to J. S. (42), and this will be a good discharge; and it is observable that in such plea, it is not necessary to allege that the lessor had notice of such assignment².

From the form of the foregoing plea, it may be collected, that an assignee, in order to exonerate himself from his liability under the covenants in a lease, must convey *all* (43) his estate and interest in the thing demised. If the conveyance falls

1 Chancellor v. Poole, Doug. 764.
in Pitcher v. Toovey, Salk. 81. 4 Mod.
71. 2 Vent. 228. Carth. 177. S. C.

by name of Toovey v. Pitcher,
3 Lev. 295. 1 Show. 340. S. C.

(42) An assignment to a beggar or a person leaving the kingdom, provided the assignment be executed before his departure, is good. Nor will such assignment be considered as fraudulent, although the assignee never takes possession. Taylor v. Shum, 1 Bos. & Pul. 21. See also Lekeux v. Nash, Str. 1221. and Odell v. Wake, 3 Camp. N. P. C. 394. An assignment to a feme covert, where husband has not refused his assent, is sufficient; for a feme covert is of capacity to purchase of others without the consent of her husband: and though he may disagree and divest the estate, yet if he neither agree or disagree, the purchase is good. Barnfather v. Jordan, Doug. 451.

(43) In Eaton v. Jaques, B. R. M. 21 G. 3. Doug. 454. it was holden, that an assignment by way of mortgage, was not an assignment of *all* the estate and interest of the assignor, so as to make the mortgagee, *who had never taken possession*, chargeable in debt for rent arrear; although the mortgage had been forfeited before such rent became due; Buller, J. observing, "that he had looked into the precedents, and they always alleged "by virtue whereof the assignee entered and was possessed." Having stated this decision it will be proper to remark, that Kenyon, C. J. twice expressed his disapprobation of it; 1st, in Westerdell v. Dale, 7 T. R. 312. "As to the cases respecting the mortgagee, *whether in or out of possession*, he is the legal owner, and must be so considered in a court of law; notwithstanding, he is subject to equitable interests. It is said in one of the cases*, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee, it is necessary to state in pleading, that he entered and was possessed; but, with great deference to the learned judge who gave that reason, I doubt it; I consider those as mere formal words." 2dly, in Stone v. Evans, Middlesex Sittings, T. 39 G. 3.

* Eaton v. Jaques had been cited in argument.

short of this, it will not amount to an assignment, so as to discharge the assignee from his liability.

In a plea of this kind, it is usual to aver the entry and possession of the person to whom the defendant assigned the premises; but such averment is not traversable^a (44).

That the whole interest in the original lease must be conveyed, in order to make a person chargeable as assignee, will appear from the following cases :

Lessee for lives, of a messuage^o, under a covenant to keep

n Walker v. Reeves, Doug. 461 n.

o E of Derby v. Taylor, 1 East's R. 509.

cited in 7 East, 341. and reported in Woodfall's Landlord and Tenant, 2d. ed. p. 113. and Abbott, p. 20. Gibbs having cited Eaton v. Jaques, Lord Kenyon said, he could not subscribe to the doctrine laid down in that case; that the defendant, who was assignee of a term by way of mortgage, was liable to the covenants in the lease, not on the ground of possession, but as assignee; his liability was not limited by his possession; so long as he had the legal estate, so long he continued liable. If he had wished to avoid that liability, he should have taken an under-lease.

(44) See Lord Kenyon's opinion as to this averment in the preceding note. It is to be observed, that assignees of a bankrupt lessee are not liable for rent arrear, where they have not taken possession of the thing demised. Per Kenyon, C. J. in Bourdillon v. Dalton and others, assignees of Bell, a bankrupt, Peake's N. P. C. 238. 1 Esp. N. P. C. 233. Neither are they bound to take possession of a *damnosa hereditas*, that is, property of the bankrupt, which so far from being valuable, would be a charge to the creditors. The assignees may take to the bankrupt's property or not, according as it is or is not beneficial to the creditors; and consequently they may do such previous acts as are necessary to ascertain whether the property be beneficial or not, before they take to it. Hence, where defendants, assignees of a bankrupt lessee, advertised the lease for sale by auction, in which advertisement they did not state that the premises belonged to them, nor for or by whom they were to be sold, but only generally that there was a saleable term, and no bidder offering, they declined interfering any further with the property; and it did not appear that they had ever taken possession either actually or by receiving or paying any rent; it was holden, that there was not sufficient evidence to fix upon the defendants the characters of assignees of the bankrupt's term, so as to render them responsible for the performance of the covenants in his lease. Turner v. Richardson; 7 East, 335. Some assent of the assignees of a bankrupt to the assignment to them, of the premises, is necessary, in order to charge them with the bankrupt's covenants. Adm. S. C.

the same in repair during the term, and at the end of the term to deliver it up so repaired, by indenture, "granted and assigned *all his estate*, and interest therein, to A. and his executors, *habendum*, to A. and his executors, for ninety-nine years, *if cestui que vie should so long live*, in as large, ample, and beneficial way, as the grantor, his heirs, &c. held the same, paying a certain rent to the reversioner." On the expiration of the lives, the reversioner brought covenant against the executors of A., for not yielding up the messuage in repair. It was alleged in the declaration that all the estate and interest of the lessee for life vested in A. by assignment. This was denied by defendants' plea. A case having been reserved and argued, the court directed the *postea* to be delivered to the defendants; Lord Kenyon, C. J. observing, that there were not any words in the indenture, by which the freehold, of which the original lessee was seised, was conveyed to the testator of the defendants; that the conveyance of all the grantor's estate, and interest to a man and his executors, for years, could not convey a freehold; that such words meant only their interest, &c. in the legal estate thereby granted; and that the court could not give those words a larger operation than the parties themselves had declared they should have.

The devisee of an *equitable estate* is not liable as assignee :

In covenant against the defendants, "as assignees of *all* the estate and interest of one George Denton, in certain grounds called Dentonholme," which G. Denton, theretofore, by an indenture, dated in the year 1654, had granted to the mayor, &c. of Carlisle, so much of the river or water of Caldew, running along his said grounds, as should be sufficient for the grinding of corn and grain at all times at their mills, with certain other liberties and powers for the use and advantage of those mills; and had covenanted, that he, his heirs, and assigns, &c. should not at any time thereafter divert or obstruct any part of the water granted. The breach assigned was, that the defendants had, after these grounds had vested in them by assignment, wrongfully continued a weir or dam, before then wrongfully erected, in and across the river Caldew, which diverted the water to the prejudice of the plaintiffs' mills. Plea: That "all the estate and interest of G. Denton, in the said grounds, called, &c. did not come to and vest in the defendants by assignment thereof;" upon which issue was joined. It appeared that one Jonathan Wilson was, at and long before the time of the breach of

covenant complained of, mortgagee in fee of the lands called Dentonholme, the defendants being only seized of the equity of redemption thereof, as devisees of one Lucy Dixon, the heir of G. Denton. Rent also appeared to have been paid to Lucy Dixon, the owner of the equity of redemption, in her life-time, and to the defendant, Tyson, as her devisee after her decease. The court were of opinion, that, considering that the whole legal estate in the premises was before, and at the time of the breach of covenant in question, vested in J. Wilson, the mortgagee, and that the defendants, the devisees, were not assignees of any part of that legal estate therein, which formerly belonged to G. Denton, the covenantor, but entitled to the mere equity of redemption thereof, it was impossible to say that the defendants were *assignees* of the estate of G. Denton, within the sense and meaning of the terms in which the issue was framed; and which terms respected that description and quality of estate alone, namely, legal estate, in virtue whereof parties are at all liable to actions of covenant, as assignees.

So where in covenant for rent arrears, brought against the defendant as *assignee* of J. S., it appeared in evidence, that by the deed, under which the defendant held, the premises were conveyed to him by J. S. for a day or some days less than the original term; the court were of opinion, that the action could not be maintained, the defendant being an under-lessee, and not an assignee of the whole term.

But where a lessee for years granted *the whole of the term* to J. S., it was holden, that J. S. might maintain an action as assignee of the term against the lessor for a breach of covenant; although in the deed of assignment, the rent was reserved to the lessee, with a power of re-entry in case of non-payment, and although new covenants were introduced into that deed.

With respect to declaring *against* an assignee, it is to be observed, that it is not incumbent on the lessor to set forth mesne assignments. It is sufficient to state, generally, that all the estate, &c.* of the lessee vested in the defendant by assignment; for it cannot be presumed, that the lessor is acquainted with the particulars of the assignee's title.

q *Holford v Hatch*, Doug 182.

s *Pitt v Russell*, 3 Ld 19.

r *Palmer v. Edwards*, Doug. 187. n.

VI. *Of the Declaration, and herein of dependent Covenants, Conditions precedent, and independent Covenants.*

Venue.—As this action is more frequently brought for breaches of covenants contained in leases, than on any other kind of covenants, the following table may be useful, in which the reader will see, at one view, in what cases such action is transitory, and in what local. The principle on which the table is framed is this: where the action is founded on privity of contract, it is transitory, and the venue may be laid in any county (45); but where the action is founded upon privity of estate only, it is local, and the venue must be laid in the county where the estate lies. In the 3d and 4th cases in the table, the privity of contract is transferred by the operation of the stat. 32 H. 8. c. 34.

TRANSITORY.

1. Lessor v. Lessee.
2. Lessee v. Lessor.
3. Assignee of Reversion v. Lessee, stat. 32 H. 8. c. 34. *Thursby v. Plant*, 1 Saund. 237.
4. Lessee v. Assignee of Reversion, stat. 32 H. 8. c. 34.

LOCAL.

5. Lessor v. Assignee of Lessee, *Stevenson v. Lambard*, 2 East, 575.
6. Assignee of Lessee v. Lessor.
7. Assignee of Reversion v. Assignee of Lessee; *Barker v. Damer*, Carth. 182. Salk. 80.
8. Assignee of Lessee v. Assignee of Reversion.

The circumstance of rent being made payable in a different county from that in which the lands lie, will not affect the

(45) If the deed bears date in a foreign country, it must be so stated in the declaration, and the venue must be added under a *scilicet*, for a place of trial.

locality of an action of covenant for non-payment of such rent^t.

It is to be observed, however, that where the action is local^u, although it be brought and tried in a wrong county, yet the defect will be aided after verdict, by stat. 16 & 17 Car. 2. c. 8.

It must appear on the face of the declaration^x, that defendant covenanted by deed; for where plaintiff declared, that defendant *per quoddam scriptum suum factum apud Westminster concessit*, &c. it was holden bad; because *scriptum* did not import a deed, and *factum* being joined to *apud Westminster*, rendered it impossible to be taken as a substantive (46).

As this action is brought on a deed^y, with the execution of which defendant is charged, plaintiff must make a profert of the deed in the declaration, and bring the deed into court, in order that the court may see whether it be executed according to law. Profert being made, defendant is entitled to craveoyer, and the court cannot then dispense with oyer, although plaintiff make an affidavit, that he has searched for the deed, and cannot find it any where (47).

Every deed is supposed to be executed the same day that

^t Barker v. Damer, Salk. 80.
^u Mayor of London v. Cole, 7 T. R. 583.

^x Moore v. Jones, Str. 814. See also Southwell v. Brown, Cro. Eliz. 571.
^y Thorsby v. Sparrow, B. R. E. 16 Geo. 2. 1 Wils. 16. 2 Str. 1196. N. C.

(46) Reynolds, J. said, that it had been holden well enough to call it *factum*, *indentura*, *scriptum indentatum*, because they implied the circumstances of sealing and delivering.

(47) In Read v. Brookman, 3 T. R. 151. in a plea in bar to an avowry, plaintiff, instead of making a profert, pleaded that the deed was lost by time and accident. On special demurrer this averment was holden good, per Kenyon, C. J., Ashurst, J., and Buller, J.—Grose, J. *dissentiente*; but, in pleading a lost deed, it is necessary to set forth the supposed names of the parties to the deed and the date. Hendy v. Stephenson, 10 East, 85. If the deed has been destroyed by fire, it may be so alleged as an excuse for the non-production of it, as in Routledge v. Burrell, 1 H. Bl. 284. where the plaintiff declared that by a certain deed poll made, &c. (which said deed poll was casually burnt and destroyed by the fire therein after mentioned). But if profert be made in the declaration, the deed must be produced; for the plaintiff, so declaring, will not be permitted to give evidence of the destruction of the deed, or of its being in the hands of the defendant. Smith v. Woodward, 4 East's R. 585.

it bears date^z. But though the deed appear on the face of it to have been made, that is, written on one day, yet if in truth it were delivered on a subsequent day, that may be shewn by averment.

A declaration in covenant stated that the deed was *indented, made, and concluded*^a, on a day subsequent to the day on which the deed itself was stated on the face of it to have been *indented, made, and concluded*; it was holden, that such allegation was no more inconsistent with the deed, than if it had been alleged that it was sealed and delivered on a day subsequent; that it was quite immaterial when it was *indented* and equally so when it was *made*, by which might be understood when it was *written*; the only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of delivering was the important time when it took effect as a deed; and from the preceding case of *Stone v. Bale*, it appeared that the delivery might be after the date.

In framing the declaration, it is not necessary to set forth the provisions of the deed *in letters and words*. It will be sufficient to state *the substance and legal effect*. Neither is it necessary to set forth *all* the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover will be sufficient (48).

Hence in covenant on a mortgage deed^b, the court were of opinion, that it was sufficient for the plaintiff to set forth in his declaration, that defendant, by a certain indenture, had demised certain premises therein mentioned (not specifying

^z *Stone v. Bale*, 3 Lev. 348. See also ^b *Dundas v. Lord Weymouth, Cowp.*
Goddard's case, 2 Rep. 4. b. 605.
^a *Hall v. Cazenove*, 4 East's R. 477.

(48) This rule ought to be strictly adhered to, as well to prevent the extension of the record to an unreasonable length, as to avoid the danger resulting to the party setting forth the deed, from variances and formal objections. In *Dundas v. Lord Weymouth, Cowp. 605.* the court said, they would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them. And in *Price v. Fletcher, Cowp. 727.* where the plaintiff in an action for breach of covenant for quiet enjoyment under a lease, had set out the whole lease *verbatim*, it was referred to the master to strike out the superfluous matter in the declaration, *with costs*. See 1 *Willm's. Saunders*, 233. n. (2), where the learned serjeant has given a concise form of declaration in covenant for non-payment of rent.

the premises) subject, among other things, to such a proviso; then setting out the substance of the covenant for the payment of the money, and breach for the non-payment.

If the deed on which plaintiff declares contain a proviso^c, operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant means to rely on it, it is incumbent on him to shew it.

It is sufficient to say, "*whereas* by a certain indenture, &c. it is witnessed, &c." without a direct affirmation^d, that by such an indenture defendant covenanted (49).

In covenant by husband of reversioner in fee^e, he must declare on a seisin in fee in himself *and his wife*, in right of his wife. If he state that he is seised of the reversion in his demesne as of freehold, it will be bad on special demurrer.

Of the Breach.—The breach assigned ought to be co-extensive with the import and effect of the covenant: but, where the covenant is general^f, the breach may be assigned as generally as the covenant; and it is sufficient, if it negative the words of the covenant: as where, on a covenant in an indenture of lease, that defendant had full power and lawful authority to demise, the breach assigned was, that defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the indenture: after verdict for plaintiff, and judgment in B. R. on error in the Exchequer Chamber, it was objected, that it was not stated in the declaration, who had title to the premises at the time of making the indenture; but it was resolved, that the assignment of the breach was good; because it had pursued the words of the covenant *negative*; and that it lay more properly in the notice of the lessor what estate he himself had in the land, than in the lessee, who was a stranger to it; and therefore defendant ought to have shown what estate he had in the land at the time of the demise,

c Elliott v. Blake, 1 Lev. 88. T. Raym. 65. S. C.

d Buttivant v. Holman, adjudged on error from C. B. in B. R. T. 17 Jac. Cro. Jac. 537.

e Polyblank v. Hawkins, Dougl. 328.

f Salmon v. Bradshaw, 9 Rep. 60 b.

Cro. Jac. 304. S. C. See also to the same effect, Muscot v. Ballet, Cro. Jac. 369. Brigstock v. Stannion, Ld. Raym. 106. Proctor v. Burdett, 1 Lev. 170. 3 Mod. 69. S. C. Boscawen v. Cook, 1 Raym. 107. Rawlins v. Vincent, Carth. 124.

(49) The court said, that there was a difference between declarations and bars in this respect; for in the declaration, "it is witnessed," was sufficient to induce the action and assign the breach.

whereby it might have appeared to the court, that he had full power and authority to demise.

So where in covenant^s, the declaration stated, that plaintiff by indenture let to defendant's testator a house for years, and the lessee covenanted to repair it well from time to time, during the term, and at the end of the term, to leave the same well repaired, and the breach assigned was, that the lessee did not leave it well repaired at the end of the term: an exception was taken, because the declaration did not shew in what point the house was not well repaired; but it was overruled; for, the breach being according to the covenant, it was sufficient; but if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then, if the plaintiff will assign any breach, he ought particularly to show in what point it was not well repaired, so as the defendant might give a particular answer thereto.

In covenant by a master against his servant^b, on a covenant not to buy or sell without the master's leave, within two years, the breach assigned was, that defendant had *diversis diebus et vicibus*, between such a day and such a day, sold to H., and to several other persons, unknown, goods to the value of 100*l*. Issue upon this, and, after verdict for plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to the times and persons; Holt, C. J. said, that in *covenant* (50) it was sufficient if a general breach was assigned; and that the breach in question was certain enough; for it was so described, that if another action were brought, the defendant might plead a former recovery for the same cause, and aver this to be the same selling. Gould, J. agreed, that the action being only for damages, it was well enough. Judgment for plaintiff.

Plaintiff declared that defendant covenanted to allow plaintiff 2*s*. for every quire of paper he should copyⁱ, and assigned for breach, that he copied four quires and three sheets, for which 8*s*. and 3*d*. was due, which defendant had not paid. On writ of error after verdict, and judgment for plaintiff in C. B., it was moved, that there could not be any apportion-

^g *Hancock v. Field and others, ex-cutors of Crouch*, Cro. Jac. 170, 171.

^h *Farrow v. Chevalier*, Salk. 139. cited 8 East, 34. & T. R. 459.

ⁱ *Needler v. Guest*, Aleyn, 9.

(50) Secus in debt on bond to perform covenants, and debt for a penalty on a statute; there a precise breach must be shewn. Lord Raym. 107.

ment in this case, for the covenant was to allow plaintiff 2s. for copying a quire, but not *pro rata*, for which cause the judgment was reversed. But it seems that on demurrer this objection would not avail the defendant, because in that case the plaintiff might remit his claim for the odd sheets, and enter up judgment for the residue, in conformity to the rule laid down in *Incedon v. Crips*, Salk. 658. recognised in *Buckley v. Kenyon*, 10 East, 143. and *infra*, that where the sum demanded does not depend on the deed itself, but upon matter extrinsic, there may be a remittitur; because the variance is not inconsistent with the deed.

In covenant the breach assigned was for non-payment of rent on different days*, which amounted to a certain sum, and the plaintiff had made a mistake in calculating the sum, it was holden good; because in this action the whole shall be recovered in damages, and the plaintiff shall not have damages according to his summing, but according to the matter.

The plaintiff declared on an indenture of demise for years of certain coal-mines¹, reserving a fourth part of the coal raised, or its value in money, at the election of the lessor; but if the fourth part fell short of the annual value of 400*l*. then reserving such additional rent as would make up that annual sum, to be rendered on the first day of every month in each year of the term, by equal portions; and that the plaintiff elected to be paid in money: the breach assigned was, that 900*l*. of the rent reserved for two years and three months was in arrear. On general demurrer, it was objected, that the rent being reserved yearly, the breach was not well assigned, inasmuch as it included a fraction of a year; but the court overruled the demurrer, observing, that it could not be sustained on the construction of the covenant; for, though it spoke of an annual sum of 400*l*. to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for the three months might be remitted, and judgment given for the residue; and *Bayley, J.* cited *Incedon v. Crips*, Salk. 658. and 2 Lord Raym. 814. as an authority in point as to the remittitur.

Where lessee covenanted for himself and his assigns to plant a certain number of trees every year^m, and the breach was, that defendant had neglected to do it; it was holden sufficient, without negating that his assigns had done it, for the court will not intend an assignment.

k *Farrer v. Snelling*, 1 Roll. Rep. 335.

m *Gyse v. Ellis*, Str. 229.

l *Buckley v. Kenyon*, 10 East, 139.

*A demurrer for misjoinder of breaches must be to the whole declaration, and not to the breach alone which is misjoined".

A* to the necessary averments in actions for breach of covenant, for quiet enjoyment, see ante, Sect. III. 6.

I shall now proceed to explain the nature of dependant covenants and conditions precedent, concurrent acts or covenants, and mutual or independent covenants, subjoining to each division such cases as appear to afford the best illustration of the subject under consideration. And first of dependant covenants and conditions precedent.

Conditions precedent.—If A. covenants to do, or to abstain from doing, a certain act, in consideration (51) of the prior performance of some act or covenant on the part of B., A.'s covenant is termed a dependant covenant, because B.'s right of suing A. for a breach of this covenant *depends* upon the prior performance, or that which the law considers as equivalent to performance of the act or covenant to be performed by B., and the prior act or covenant, on the part of B., being in the nature of a condition precedent, is technically termed a condition precedent, the performance whereof must be shewn by B., in order to entitle him to recover damages against A. (52).

The following cases will illustrate the nature of a dependant covenant and condition precedent, and the reader may collect from them the rules by which the courts have guided their decisions on this subject.

The plaintiff declared*, that defendant by deed poll (53) agreed with the plaintiff, that he, defendant, would accept of the plaintiff a quantity of South Sea stock, so soon as the re-

n Kingdon v. Nottle, 1 Maule and o Lock v. Wright, Str. 569.
Selwyn, 355.

(51) It is not necessary that it should be stated in terms to be "in consideration of;" if the manifest intention be so, it is sufficient.

(52) It may be remarked, that if the act, undertaken to be done, is dispensed with by the other party, it is sufficient so to state it on the record. Per Buller, J. in Hotham v. East India Company, Doug. 278. See an averment to this effect in Jones v. Barkley, Doug. 684.

(53) In Strange's statement of the case, p. 569. it is said to have been by writing indented; but it is evident from the reasoning of the court, even in Strange (see p. 571.) that it was a deed poll. See also S. C. 8 Mod. 40. where it is expressly stated to have been an action of covenant on a deed poll.

ceipts should be delivered out by the company, and would pay for the same such a sum on a certain day, next after the date of the deed, and then averred that defendant did not pay the money at the day; on general demurrer, because the plaintiff had not averred an assignment of the stock, or a tender, Pratt, C. J. delivering the opinion of the court, said, that the intent of the parties appeared to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent; that this was not a covenant entered into by both parties, upon which each would have his mutual remedy, but it was the deed poll of the defendant only; and, therefore, though upon delivery or tender of the stock, the plaintiff would have his remedy for the money, yet the defendant, on the other side, upon payment of the money, would not have any remedy to compel the delivery of the stock, and therefore he should not be obliged to pay the money until the consideration for which it was payable was performed: that the word *pro* would be either a condition precedent or subsequent, as would best answer the intent of the parties; and in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money, could never take effect. Judgment for defendant (54).

In covenant against a lessee for not repairing^g, the declaration stated, that by indenture the defendant covenanted to repair the demised premises, and at the end of the term to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs: the breach assigned was for not repairing; the defendant pleaded, that the plaintiff did not find timber sufficient: on demurrer, it was adjudged, that the finding the timber was a thing in its nature necessary to be done first, and therefore a condition precedent, the performance of which ought to have been averred in the declaration.

So where in a covenant on an indenture of lease for seven

p Thomas v Cadwallader, Willes, 496.

(54) Pratt, C. J. observed also, that the difference between a mutual covenant and a deed poll was taken and allowed in *Pordage v. Cole*, 1 Saund. 320. where the court were of opinion that the defendant had his remedy; "otherwise (says the book) it would have been, if the deed had been the words of the defendant only."

years, for non-payment of rent⁹, it appeared that the lease contained the usual covenants, that the lessee should pay rent, repair, &c., and a proviso, that if the lessee, at the end of the first three or five years, should be desirous of quitting, and should give six months notice thereof, before the expiration of the three first years, then, from and after the expiration of the first three years, and payment of all rents, and performance of the covenants on the part of the lessee, the indenture should be void; it was holden that the payment of rent, and performance of the other covenants, by the lessee, were conditions precedent to the lessee's determining the term at the end of the first three years, and that merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose; Lord Kenyon, C. J. observing, that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention, (and there were not in this case) should give way to that intention: that it was impossible to read this lease, without seeing, that the parties intended, that the tenant should do every thing required of him, before he could put an end to the lease.

So where by a policy of assurance against fire it was stipulated⁷, that the assured sustaining any loss by fire should procure a certificate of the minister, churchwardens, and of some reputable householders of the parish, importing that they knew the character of the assured, and believed that he had sustained the loss by misfortune, and without fraud: it was holden, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial, that the minister and churchwardens wrongfully refused to sign the certificate; Lawrence, J. observing, that the cases were uniform to shew, that if a person undertakes for the act of a stranger, that act must be done (55) See *Routledge v. Burrell*, 1 H. Bl. 254. and *Oldham v. Bewicke*, 2 H. Bl. 577. n. (a) to the same effect.

q *Porter v. Shepherd*, B. R. E. 36 G. 3. r *Worsley v. Wood*, in error from C. B. affirming judgment of C. B. 6 T. R. B. R. T. 36 Geo. 3. 6 T. R. 710. 605.

(55) If A. be bound to B. to pay ten pounds to C., A. tenders to C. and he refuseth, the bond is forfeited. 1 Inst. 208. b. If a man be bound in an obligation, with condition to enfeoff B. (who

So where in covenant on a charter party¹, to recover the value of a ship against defendant, to whom she had been let to freight, for the purpose of carrying government stores to America, the declaration stated a covenant, that "if the ship were taken during the time she was in his Majesty's service, and it should appear to a court-martial that the master and ship's company had made the utmost defence they were able, the value of the ship should be paid by the defendant;" and then averred a capture, the master and ship's company having made the utmost defence they were able, and that it would have appeared to a court-martial, &c. if the defendant had thought proper to have had an inquiry made in that respect by a court-martial. The defendant pleaded, that it hath not appeared, &c. On demurrer to the plea, the court gave judgment for the defendant, observing that the charter party annexed an express condition, that it should appear to a court-martial, &c. and therefore the plaintiff was bound to shew that it had appeared, or that it arose from the fault of the defendant that it had not.

So where in covenant on a charter party of affreightment², whereby the plaintiff let his ship to the defendant to freight from Liverpool to W., and back to Liverpool, and agreed that the master should take on board a cargo of salt to W., and after delivering the same there, should take on board there a cargo of deals; in consideration of which the defendant agreed to pay to the plaintiff, "in full for the freight for the said voyage, at the rate of so much per standard hundred for deals delivered at Liverpool, &c.; the freight to be paid one fourth in cash on her arrival, and the remainder by an acceptance on London at four months' date." The declaration then averred, that the ship, after carrying the cargo of salt to W., took on board there a cargo of deals, &c. and proceeded on her voyage towards Liverpool, &c. and whilst the ship was so proceeding, &c., and after she had performed a great part of her voyage, but before her arrival at Liverpool, on, &c., the ship was, by the force of the winds and waves,

¹ Davis v. Mure, B. R. M. 92 Geo. 3.
cited in argument in Hotham v. East
India Company, 1 T. R. 642.

² Cook v. Jennings, 7 T. R. 881.

is a mere stranger) before a day, the obligor doth offer to enfeoff B., and he refuseth, the obligation is forfeit, *for the obligor hath taken upon him to enfeoff him*, and his refusal cannot satisfy the condition, because no feoffment is made. 1 Inst. 209. a.

wrecked, and thereby became incapable of proceeding any farther on the voyage, by reason whereof the deals were obliged to be put on shore for the preservation thereof; "which said deals, so unladen, the defendant afterwards accepted, and sold the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the freight for the carriage of the said deals from W. to Liverpool, &c.;" with an averment that a proportionable part amounted to such a sum. And the breach assigned was in the non-payment of that sum. The defendant pleaded, that no part of the cargo of deals was delivered at Liverpool, according to the form and effect of the said charter-party. On special demurrer to the plea, assigning for cause, that the defendant had not confessed and avoided or denied the matter alleged in the declaration, but had attempted to put in issue collateral matters, it was holden that the plea was good; Lawrence, J. observing, that when a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata*, unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties (56); but here the plaintiff has resorted to the original agreement,

(56) The principal cases on the subject of apportionment of freight are, *Lutwidge v. Grey*, D. P. 23 Feb. 1733.—*Luke v. Lyde*, 2 Burr. 882. and 1 Bl. R. 190.—*Baillie v. Modigliani*, Park's Ins. 53.; but not reported elsewhere. These three cases are stated at length in Mr. Abbott's book on Shipping. The case of *Luke v. Lyde* was much commented upon in *Cook v. Jennings*, 7 T. R. 381. and in *Mulloy v. Backer*, 5 East, 316. See further on the same subject *Ward v. Felton*, 1 East, 507.—*Hunter v. Prinsep*, B. R. M. 49 G. 3. 10 East, 378.—*Liddard v. Lopes*, B. R. 11. 49 G. 3. 10 East, 526.—*Ritchie v. Atkinson*, post n. (59). *Christy v. Row*, 1 Taunt. 300.—"It is a settled rule even in the case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an implied assumpsit. Upon this ground freight is daily recovered in actions of assumpsit on implied promises, substituted for the charter parties by deed." Per Cur. in *Burus v. Miller*, 4 Taunt. 748. But see a limitation of this remark in *Schach v. Anthony*, 1 Maule and Selwyn, 573. See also *Pinder v. Wilks*, 5 Taunt. 612.

under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action.

From the preceding cases it may be collected, that wherever there is a condition precedent on the part of the plaintiff, performance, or that which is equivalent to performance (57), must be alleged and proved, otherwise the action cannot be supported; and, consequently, the defendant may plead non-performance of the condition precedent in bar of the plaintiff's action; or, if the averment of performance be entirely omitted, or imperfectly made (58) the defendant may take advantage of it on demurrer.

The reader who is desirous of pursuing this branch of the subject further, is referred to the analagous cases under tit. Assumpsit, ante p. 105—110. To the cases there abridged, the following may be added: *Hesketh v. Gray*, Say. 185.—*Collins v. Gibbs*, 2 Burr. 899.—*Campbell v. French*, 6 T. R. 200. See also *Smith v. Wilson*, 8 East, 437. *Storer v. Gordon*, 3 M. and S. 308.

Having thus endeavoured to illustrate the nature of conditions precedent, I shall proceed to the next object of consideration, viz. concurrent acts or covenants.

Concurrent Acts.—Where reciprocal acts or covenants are to be performed by each party at the same time, they are technically termed concurrent acts or covenants; and in this case, as well as in the case of dependent covenants, one party cannot maintain an action against the other, without averring performance, or that which is equivalent to performance, of the acts or covenants to be performed on the plaintiff's part.

(57) "Where a person, by doing a previous act, would acquire a right to a debt or duty; by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." Arg. *Jones v. Barkley*, Doug. 685, cited by Lord Ellenborough, C. J. delivering the judgment of the court in *Smith v. Wilson*, 8 East, 443.—So if the plaintiff has been discharged by the defendant from the performance of the condition, the action may be maintained. See *Jones v. Barkley*, Doug. 684. So where the plaintiff has been prevented from the performance by the neglect and default of the defendant. 1 T. R. 645.

(58) As to what will be a sufficient averment in this respect, see *Jones v. Barkley*, Doug. 684. *

As where in covenant, the declaration stated^a, that by articles of agreement under seal, the plaintiff covenanted to convey to the defendant, on or before the 1st of August, 1797, a school-house and ground; and on or before the 24th June, 1796, to surrender up the premises, and deliver over the scholars to the defendant; and, in *consideration thereof*, the defendant covenanted to pay the plaintiff a sum of money, on or before the 1st of August, 1797, with interest from the 1st of January next preceding the said 1st of August; the plaintiff then averred, that he surrendered up the premises to defendant on the 24th of June, 1796, and delivered over the scholars; and, although the plaintiff had well and truly performed every thing contained in the articles on his part, yet defendant had not paid the money and interest. The defendant pleaded that he was ready to accept a conveyance of the premises, and at the same time to pay the money to the plaintiff, if he would have made such a conveyance, but the plaintiff did not, on or before the first of August, or at any time since, convey the premises to defendant. On demurrer, it was holden, that as the substance of the consideration to entitle the plaintiff to receive the money, was the making the conveyance, payment of the money could not be enforced, until the conveyance was made, or at least offered to be made by the plaintiff; Lawrence, J. observing, that nothing could be inferred in favour of the plaintiff in this case from part execution of the contract; because, though the defendant was to be put in possession in June, 1796, and the money was to be paid in August, 1797, yet as that also was the time fixed for the execution of the conveyance, it was plain, that the defendant did not intend to part with his money until his title was secure.

So where A. covenanted that he would, on or before a certain day², convey land to B., by such conveyance as B.'s counsel should advise: in consideration of which B. covenanted to pay A., at or upon the execution of the conveyance, a certain sum of money; it was holden, that A. could not maintain covenant against B. for non-payment of the money, without shewing that he had conveyed, or that he was ready at the day to have conveyed, what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, or omission, or neglect, on the part of the defendant.

^a *Glazebrook v. Woodrow*, B. R. M. x *Heard v. Wadham*, 1 East, 619.
40 Geo. 3. s. T. R. 366. cited for pl.
in 2 Bos. & Pul. N. R. 236.

Mutual and independent Covenants.—Where covenants are mutual and independent, one party may maintain an action against the other for a breach of his covenants, without averring a performance of the covenants on his, the plaintiff's part; and the defendant cannot plead non-performance of such covenants on the part of the plaintiff in bar of the plaintiff's action.

In covenant on articles of agreement*, whereby the plaintiff, who was master of a vessel, covenanted to make use of the same in the coal trade, for the defendant's service; and, among other things, covenanted that during twelve calendar months (the time the vessel was hired for) he would pay all seamen's wages yearly; in consideration whereof, the defendant covenanted to pay the plaintiff 42*l.* every month during the year; the non-payment whereof was the breach assigned. To this the defendant pleaded, that the plaintiff did not pay the seamen according to his covenant; on demurrer to this plea, it was insisted by the plaintiff, that these were mutual covenants, and that though the words were "in consideration thereof," yet in the nature of the thing, this could not be a condition precedent, for the payment of the seamen, by the plaintiff, was to be yearly; of the plaintiff, by the defendant, monthly; so that from the manner of covenanting, it was impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do; and the case of *Thorp v. Thorp* was cited, where this distinction is taken by Holt, C. J. in the resolution of that case; Judgment for the plaintiff; Lord Hardwicke, C. J. observing, that there could not be any condition precedent here for the reason given; and the resolution in *Thorp v. Thorp* was certainly good law; for these cases did not depend so much on the manner of penning the covenants, as the nature of them.

It was agreed, between plaintiff and defendant*, by indenture, that in consideration of 500*l.* plaintiff should instruct defendant in bleaching materials for making paper, and permit defendant, during the continuance of a patent, which plaintiff had obtained for that purpose, to bleach such materials according to the specification. In pursuance of this agreement, the plaintiff, in consideration of 250*l.* paid, and of the further sum of 250*l.* to be paid, to the plaintiff, in the manner herein after mentioned, covenanted that he would,

y *Dawson v. Myer*, Str. 712.

a *Campbell v. Jones*, B. R. H. 36 G. 3.

z *Russon v. Coleby*, T. 7 Geo. 3 B. R. 6 T. R. 570.

7 Mod. 236. Leach's edit.

with all possible expedition, instruct the defendant, in the manner of bleaching the materials. The defendant, in consideration of the plaintiff's covenants, covenanted that he would, on or before the 25th of February, 1794, or sooner, in case plaintiff should before that time have sufficiently taught defendant in bleaching the materials, pay the plaintiff the further sum of 250*l*. In covenant on the preceding agreement the breach assigned was, the non-payment of the 250*l*. Special demurrer, that it was not averred that plaintiff had instructed defendant in the manner of bleaching the materials. Lord Kenyon, C. J. delivering the opinion of the court, said, that whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on defendant's covenant, it should be averred, in the declaration, that such thing was done. "Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary, *unless a day is appointed for performance.*" Per Holt, C. J. Salk. 113. "If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money, before the thing be done," *ib.* 171. Upon the authority of these cases, the judgment of the court must be in favour of the plaintiff, if, upon the true construction of the deed, a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants *with all possible expedition, not by any fixed time*, to instruct the defendant, and in consideration of the plaintiff's covenants, the defendant covenants, that he will, on or before the 25th day of February, or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l*. The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed. Judgment for plaintiff. N. In a subsequent case, in 8 T. R. 370. Kenyon, C. J. speaking of the preceding case of Campbell v. Jones, said "The instruction to be given was not to be, and could not in the nature of the thing be, performed at the same time with the payment of the money by the defendant for which a certain time was limited, whereas no time was limited for giving the instruction;" and Lawrence, J. in the same report, p. 374. observing on this case, said, "that the instruction might, consistently with the plaintiff's covenant, as well be given after as before the time specified for the

payment of the money; and, therefore, it was not necessary to be averred in an action to recover the money" (59).

For a further illustration of this branch of the subject, see *Blackwell v. Nash*, Str. 535.—*Wyvill v. Stapleton*, Str. 615.—*Martindale v. Fisher*, 1 Wils. 88. and ante, p. 113.

(59) I cannot dismiss the consideration of this subject, without taking notice of a class of cases, in which this principle has been established; viz. that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for a breach of which the party injured may be compensated in damages. The first of this class is the case of *Boone v. Eyre**, which was stated by Lawrence, J. in *Glazebrook v. Woodrow*, 8 T. R. 373. as follows. The plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for a good title, quiet enjoyment, and further assurances, in consideration of a sum in gross, and a certain annuity for lives, which the defendant covenanted to pay, "he, the plaintiff, well and truly performing all and singular the covenants, clauses, recitals, and agreements, in the said indenture of sale contained;" and, in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant by his fourth plea; pleaded, "that the plaintiff, at the time of making the said indenture, had not in himself full power, true title, and good and lawful authority, to bargain, sell, and release the said plantation and negroes, &c. in manner and form as in the said indenture mentioned." The court said, it would be strange if such a defence were to be allowed, when, if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. Lawrence, J. having thus stated the case, proceeded to observe, that the judgment of the court went on the ground that, in the form the breaches were assigned, *the plea did not necessarily go to the whole of the consideration*: but if the plea had been, that the plaintiff had not any title to the plantation, he did not know, that it would not have been held sufficient. Le Blanc, J. observing upon the same case, said, "The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity, to say, that the plaintiff had not a good title in some of the negroes, which were upon the plantation; *because all the material part of the covenant had been performed*; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest;" 8 T. R. 375. The case of *Boone v. Eyre* was recognized by Lord Kenyon, in delivering the opinion of the court, in *Campbell v. Jones*, 6 T. R. 572, 573. and stated

* Reported, but imperfectly, in 2 Bl. R. 1312. and 1 H. B. 273. n.

See also *Boone v. Eyre*, 2 Bl. R. 1312. and *Terry v. Duntze*, 2 H. Bl. 389.

It remains only to add a similar observation to that which

to be another ground for giving judgment for the plaintiff in that case. And, in the case of *Hall v. Cazenove*, B. R. H. 44 Geo. 3. 4 East's R. 483, 484. Lawrence, J., having stated *Boone v. Eyre* at length, applied the principle of the decision to the case then before the court. The doctrine laid down by Ld. Mansfield, in *Boone v. Eyre*, 1 H. Bl. 273. n and 6 T. R. 573., viz. "that where mutual covenants go to the whole of the consideration, on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent;" was relied on in *Ritchie v. Atkinson*, 10 East, 295. There the master and the freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to Petersburg, and there load, from the freighter's factors, a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp £5 per ton, for iron 5s. a ton, &c.; one half to be paid on right delivery, the other at three months. It was holden, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo delivered in London at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. In *Havelock v. Geddes*, B. R. 10 East, 555. the authority of *Boone v. Eyre* was recognized by Ld. Ellenborough, C. J. delivering the judgment of the court. And in *Davidson v. Gwynne*, 12 East, 389. where freight was covenanted to be paid in consideration of several things, one of which was the sailing with the first convoy; it was holden, that as the object of the contract was the performance of the voyage, which in this case had been performed, the sailing with the first convoy was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured might be compensated in damages. It was holden also, in the same case, that the covenant for the right and true delivery of the goods was satisfied by the delivery of the entire number of chests, and that the deteriorated state of their contents afforded no answer to this action for the recovery of the freight, the defendant having a cross action to recover damages for that.

Defendant by charter-party covenanted to load a ship at Jamaica with a complete cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt. The agent of the defendant tendered to the captain a cargo, but insisted upon his signing bills of lading for it, at the rate of 10s. per cwt. The captain refused to take it on board on these terms. Lord Ellenborough held, that the defendant was liable for dead freight. *Hyde v. Willis*, 3 Camp. N. P. C. 302.

was made at the close of the third section, tit. Assumpsit, ante, p. 113. viz. that there are not any precise technical words required to constitute a condition precedent, or a dependent or independent covenant. Whether a condition be precedent or subsequent or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties, as far as that can be collected from the instrument; and, however transposed the covenants may be, their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established, that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence, that an action cannot be maintained unless performance, or that which the law considers as equivalent to performance, be averred and proved. But where a right of action is once vested in the plaintiff, liable, however, to be divested by the non-performance of a condition subsequent, that is matter of defence only, and must be shewn by the defendant.

b Per Lord Mansfield, C. J. in *Kings- c Williams v. East India Company,*
ton v. Preston, Doug. 540. 1 T. R. 638.

VII. *Of the Pleadings:*

1. *Accord and Satisfaction.*
2. *Eviction.*
3. *Infancy.*
4. *Levied by Distress.*
5. *Nil habuit in tenementis.*
6. *Non est factum.*
7. *Non infregit conventionem.*
8. *Performance.*
9. *Release.*
10. *Set-off.*

1. *Accord and Satisfaction.*

ACCORD with satisfaction is a good plea in discharge of damages for covenant broken (60).

In covenant against an assignee for not repairing a house^d, the defendant pleaded accord between him and the plaintiff, and execution thereof, in satisfaction and discharge of the want of repairs; on demurrer, it was objected, that this action of covenant was founded upon the deed, which could not be discharged except by matter of as high a nature, and not by any accord or matter in *pais* : but it was resolved by the court, that the plea of the defendant was good; and this distinction was taken: where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money; in that case, the duty, which is certain, takes its essence and operation originally and solely by the writing, and therefore it must be avoided by matter of as high a nature, although the duty be merely in the personalty^e (61). But where no certain duty accrues by the deed, but a wrong or subsequent default, together with the deed, gives an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea, as in this case, the covenant does not give the plaintiff, at the time of making it, any cause of action, but the tort or default in not repairing the house, together with the deed, gives an action to recover damages for the want of reparation. The action is not founded merely on the deed, but on the deed and the subsequent wrong; which wrong is the cause of action, and for which damages shall be recovered, and in every action where

d Blake's case, 6 Rep. 43 b. Cro. Jac.
99 S. C. by the name of Alden v.
Blague.

e See next case.

(60) In *Snow v. Franklin*, Lutw. 358. to covenant for non-payment of rent, the defendant pleaded accord with satisfaction of the covenant, before any breach. The plea was holden bad on demurrer. See also *Kaye v. Waghorn*, 1 Taunt. 428. S. P.

(61) A collateral agreement by parol cannot be pleaded to invalidate a claim arising upon a deed. Hence to debt on bond, conditioned for the performance of an award, a parol agreement between the parties to wave and abandon the award cannot be pleaded.—*Braddick v. Thompson*, 8 East, 344.

compensation is demanded, by way of damages only, accord executed is a good bar.

The plaintiff being seised in fee of a messuage and lands^f, one parcel of which, consisting of about one-third, lay contiguous to the land of one E. P., in consideration of a sum of money, and the covenant herein-after mentioned, by indenture released the said parcel of land to E. P. in fee, who thereupon covenanted for herself and her assigns, that she would, from time to time, and at all times thereafter, pay one-third part of all the taxes and assessments that should be imposed on the said messuage and land; the parcel of land came to the defendant by assignment, who neglected to pay the one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5, and 6, the defendant pleaded, that in Michaelmas Term, 1766, he commenced an action against the plaintiff, and one R. J., for certain trespasses committed by them upon the lands and goods of the defendant; and, thereupon afterwards, to wit, on the 22d of January, 1767, it was agreed, (not saying by deed) that the defendant should put an end to his suit, and that plaintiff and R. J. should pay a certain sum of money, and costs; and that *the plaintiff should relinquish all damages and demands, which he then had against the defendant*; the plea then averred, that the defendant did not further prosecute his suit against the plaintiff and R. J., and prayed judgment of the action. On general demurrer to this plea, it was objected, that a covenant to pay money, which was by deed, could not be discharged without deed; and of this opinion was the court, and gave judgment for plaintiff. Blake's case, 6 Rep. 41 a. was cited.

Covenant by the heir in reversion^g against executor of tenant for life, for breach of covenant in testator, in not repairing the house demised: plea, that the testator, tenant for life, died on such a day, and that afterwards it was agreed, between the plaintiff and defendant, that defendant should quietly depart and leave possession to the plaintiff, and, in consideration thereof, the plaintiff agreed to discharge him from the breach; and averred, that within five days from the day of agreement he left the house. On demurrer, the plea was holden to be bad; for the time was not fixed by the terms of the agreement, when the executor should depart; and, although it was averred that he departed within five days, yet that would not aid the first uncertainty; for the agreement

^f Rogers v. Payne, MSS 2 Wils 376.
S C briefly stated.

^g Samford v. Cutcliffe, Yelv. 124. Russell v. Do, 3 Lev 199.

was the foundation of the whole, which ought to be certain, when it should be performed.

2. Eviction.

To covenant for rent arrear, the lessee may plead^b, that he was evicted, by the lessor, from the demised premises, and kept out of possession until after the rent in question became due; for an *eviction* occasions a suspension of the rent; but a mere trespass will not: for where to covenant for rent arrear for a dwelling house^c, the defendant pleaded that the lessor had taken away a pent-house, fixed to the dwelling-house, and part of the demised premises; on demurrer, the court held that the fact stated in the defendant's plea being a mere trespass, for which the defendant might have a remedy by action, would not operate as a suspension of the rent (62).

It is to be observed^k, that if a tenant would excuse himself from payment of rent upon an eviction by a stranger, he must shew that such stranger had a good title to evict him: and, in order to give the plaintiff a proper opportunity of controverting such title, the defendant must shew particularly how it arises; for, if it were sufficient to allege that the stranger had a good title, a single issue could not be taken on it; and as the legality, as well as the fact of the title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court only. To avoid this inconvenience, it is necessary that the title should be specified.

3. Infancy.

At the common law, infants are not bound by covenants which operate to their disadvantage. Hence a defendant may insist on his non-age, as a defence to an action of covenant:

^b Dalton v. Reeve, 1 Ed. Rayn. 77.

^c Roper v. Lloyd, T. Jones, 148 cited by Dunning, in Hunt v. Cope, Cowp.

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^k Per Lord Hardwicke, C. J. in Jordan v. Twells, B. R. M. 9 Geo. 2. MSS. and Ca. Temp. Hardw. 179.

(62) Although rent is suspended by an entry into part*, yet on a demise of a messuage with the appurtenances, the covenant to repair is not suspended by an entry into the back yard, the lessee remaining in possession of the messuage. Snelling v. Stagg, Bull. N. P. 165.

* Dorrell v. Andrews, Hob. 190.

but this defence must be pleaded specially, and cannot be given in evidence on *non est factum*. The stat. 5 Eliz. c. 4. whereby infants are enabled to bind themselves apprentices, has not altered the common law as to the binding force of covenants entered into by infants, at least where the covenants are collateral covenants. This point appears to have been doubted formerly¹, but was fully established in the following case:

In covenant against an apprentice for departing from the plaintiff's service^a, without licence, within the time of his apprenticeship; the defendant pleaded, that at the time of making the indenture he was within age. On demurrer, judgment was given for the defendant; the court being unanimous, that, although an infant might voluntarily bind himself an apprentice, and if he continued an apprentice for seven years, might have the benefit to use his trade; yet, neither at the common law, nor by stat. 5 Eliz. c. 4. did a covenant or obligation of an infant, for his apprenticeship, bind him; nor did any remedy lie against an infant, upon such covenant (63).

4. Levied by Distress.

In covenant for non-payment of rent^a, the defendant cannot plead, *levied by distress*; because it amounts to a confession, that the rent was not paid at the time appointed; for the plaintiff could not have distrained, if the rent had not been in arrear at the day.

5. Nil habuit in tenementis.

If a lease be by indenture, the lessor and lessee are concluded from avoiding the lease: and if an action be brought, and the plaintiff declare on the indenture^a, and the defendant

¹ Fleming v. Pitman, Winch, 63. Hutt. 63. 8 C. E. T. 21 Jac.

^m Gylbert v. Fletcher, Cro. Car. 179. Lilly's case, 7 Mod. 15. S. P.

^a Hare v. Savil, 1 Brownl. 19 2 Brownl. 273. S. C.

^o Palmer v. Ekins, Str. 818. 11 Mod. 411. Leach's ed. Lord Raym. 1550 S. C.

(63) See a dictum to the same effect, with the exception of special custom, in Whittingham v. Hill, Cro. Jac. 494. By the custom of London, an infant may bind himself by covenant in an indenture of apprenticeship. 2 Rol. R. 305. Codev. Holmes, Palm. 361. Anon. 1 Lev. 12. Horn v. Chandler, 1 Mod. 271.

pleads, that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur: because the estoppel appears on the record.

Covenant was brought by the assignee of a reversion for non-payment of rent^p: it was stated in the declaration, that J. P., on a certain day, was seized in fee, and on the same day demised by indenture to the defendant; that J. P. afterwards assigned the reversion in fee to the plaintiff. Plea, that before the demise and assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seized in fee. On general demurrer it was holden, that this plea was a special *nil habuit in tenementis*, which was no more to be allowed, where the demise was by indenture, than a general plea of that kind; and although the plaintiff was an assignee, yet he might take advantage of the estoppel, because it ran with the land.

In covenant by lessor on an indenture of lease for not repairing^q, the lessee pleaded, that the lessor had an equitable estate only in the thing demised: on special demurrer, the plea was holden bad.

It is an universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord, under whom he holds: this is not a mere technical rule, but one founded in public convenience and policy. Hence a lessee of land in the Bedford level^r cannot object to an action by his landlord for a breach of covenant, in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17. for want of being registered. The act meant, for the protection of titles, that leases and conveyances, within this district, should be registered, that every person interested in the inquiry might know in whom the title to such land was; and, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate.

Covenant for rent was brought on an indenture of lease^s, by the assignees of the lessor (a bankrupt); the defendant pleaded, that the lessor *nil habuit in tenementis*; it was holden bad, on general demurrer. In like manner it has been

^p Palmer v. Ekins, ubi supra.

^q Blake v. Forster, 3 T. T. 497.

^r Hudson v. Sharpe, 10 East, 330.

^s Parker and others assignees of Steel (a bankrupt) v. Maunsing, 7 T. R. 517.

adjudged¹, that an assignee of lessee under a lease by indenture cannot plead that the lessor did not demise.

It may be observed, that in the preceding cases, the want of title does not appear on the face of the declaration; and it seems that, in order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for in *Nokes v. Awdor*, Cro. Eliz. 373. 491, it was resolved, by all the judges, that although they would not intend a lease to be good by estoppel only, yet where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease. So where covenant was brought against a lessee for years, on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on the ground that the lease was void by the death of tenant for life; Buller, J. observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff, on the pleadings, that he did not execute until after death of the tenant for life. So where the plaintiff declared, that by deed made between her as attorney for J. S.² on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted to pay the rent to J. S., and then assigned a breach in the non-payment of the rent, to the damage of the plaintiff (the attorney); On demurrer it was objected, that the lease was void, because the plaintiff acting only as attorney to J. S., it should have been made as a lease from him, and in his name³, and that, the lease being void, the covenant to pay the rent was void also. *E contra* it was insisted, that the instrument being under seal, the defendant was estopped from saying the plaintiff did not demise. But the court held, that, it appearing on the declaration that the lease was void, because it was not made in the name of J. S. whose house it appeared to be, and that the plaintiff only made it as his attorney, there could not be any estoppel, and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action.

¹ *Taylor v. Noydham*, 2 Taunt. 978

² *Luddard v. Barber*, 1 T. R. 26.

³ *Frontin v. Small*, Ld. Raym. 1419.

Str. 705 S. C.

y See *Wilks v. Back*, 2 East, 142.

Where a lease, by indenture, takes effect in point of interest, which interest *may* be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from shewing the facts which determined the lease; as where A., lessee for life of B., makes a lease for years², by deed indented, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. (64). So where covenant was brought by plaintiff³, as heir in reversion in fee to his brother, on an indenture of lease for years, made to defendant by plaintiff's father, and breach assigned for want of repairs; defendant pleaded, that the father was tenant for life only, and that the lease had determined by his death, and traversed, that after the making the lease, the reversion in fee had belonged to the father; on demurrer, judgment was given for the defendant; for, as was said in argument, and adopted by the court, though during the father's life, the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end; and the lessee was not estopped from pleading the truth by confessing and avoiding the lease; and it was holden, that the traverse was well taken.

6. *Non est factum.*

There is not any general issue to an action of covenant, but the defendant may plead that the deed (on which the plaintiff has declared) is not his deed. This plea puts in issue the due execution of the deed, which it is incumbent on the plaintiff to prove. If there be a subscribing witness to the deed, the execution must be proved by such witness (65).

To support the plea of *non est factum*, the defendant may give in evidence any thing which proves the deed to be void at

² 1 Inst. 97 b. See *Treport's case*, a *Bradwell v. Roberts*, 2 Wils. 143. 6 Rep. 15 a. to the same effect.

(64) This case having been cited in *Gilman v. Hoare*, Salk. 275. Holt, C. J. said, that the reason of it was, because tenant for life has a freehold, which is a greater estate, and the lease will not require any estoppel, if the life endure.

(65) For the exceptions to this rule, see post tit. Debt on bond; *non est factum*, p.

the time of pleading; as drawing a pen through a line or material word; rasure; addition to; or other alteration of the deed in a material part; or a material variance between the deed declared on and the deed produced in evidence^e.

So coverture of the defendant, at the time of execution, may be given in evidence under this issue.

In covenant, the declaration stated a joint demise by husband and wife^d. Plea, *non est factum*. It appeared in evidence that the husband was tenant for life, with remainder to the wife for life, and that they had jointly demised to the defendant. After verdict, a motion was made for a new trial, on the ground, that the demise stated was an impossible demise; for the husband alone had the power of demising, and the wife could only confirm; the court discharged the rule: and Blackstone, J. said, "The issue is, that there is no such deed as stated in the declaration; if in fact such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiffs to make such demise, and thereby evade the performance of what he himself has stipulated. And Nares, J. said, on the issue of *non est factum* in covenant, the deed only must be proved.

If the plaintiff declares for a breach of covenant, and states the covenant, by itself, in its own absolute terms, without the qualifying context, which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a non-suit on the ground of a variance, on the plea of *non est factum*^e.

The declaration set forth a covenant to repair generally. Plea, *non est factum*. The deed, when produced contained an exception of fire and other casualties. This was holden to be a fatal variance^f.

If *nil debet* be pleaded to covenant on an indenture of lease for non-payment of rent, the plaintiff may demur^g.

^b Whelpdale's Case, 5 Rep. 119. ^h Pigot's Case, 11 Rep. 27. a.

^c Pitt v. Green, 9 East, 188. Bowditch v. Mawley, 1 Camp. N. P. C. 195. Hear v. Mill, B. R. H. 56 Geo 3.

^d Friend v. Eastbrook, 2 Bl. Rep. 1152.

^e Adm. per Cur. in Howell v. Richards, 11 East, 638.

^f Tempany v. Hurnard, 3 Camp. 20. ^g Tyndal v. Hutchinson, 5 Lev. 170.

*7. *Non infregit conventionem.*

I am not aware of any case at common law (66) in which *non infregit conventionem* has been holden to be a good plea on demurrer; if it can be pleaded in any case, it must be in the single case where the declaration states a single breach of covenant in the affirmative, and concludes with an affirmative allegation, "And so the defendant has broken his covenant."

In the following cases, the plea of *non infregit conventionem* was holden to be improperly pleaded.

In covenant on a lease^a, for not repairing the premises demised, the plaintiff assigned several breaches. Plea, *non infregit conventionem*. On demurrer the court gave judgment for the plaintiff, on these grounds; 1st, That the plea was too general; for several breaches were assigned: 2d, That the breach being in *non reparando*, *non infregit conventionem* could not be a good plea; because two negatives could not make a good issue.

So where in covenant^b, the breach assigned was for non-payment of an annuity; the defendant pleaded, that he had not broken his covenant; special demurrer, that the breach and plea both being in the negative, there was not any issue. Judgment for the plaintiff.

So where plaintiff declared on a covenant for quiet enjoyment^c, and assigned several breaches, in which were stated evictions by different persons, and concluded with these words, "and so the defendants have not kept their covenants." The defendants pleaded *non infregit conventionem*. On special demurrer, assigning for causes, that the plea attempted to put in issue several matters, and to make an issue out of two negatives, the court gave judgment for the plaintiff, observing that the plea was only argumentative, and therefore an improper plea.

^a Pitt v. Russel, 3 Lev. 19. Taylor v. Needham, 9 Taunt. 278.
^b Boone v. Eyre, 2 Bl. Rep. 1340.

^c Hodgson v. The East India Company, 8 T. R. 278.

(66) By stat. 11 G. 1. c. 30. s. 43, in actions of covenant upon policies of insurance under the common seal of either of the two insurance companies (Royal Exchange and London Assurance), the defendants may plead that "they have not broke the covenants, in such policy contained, or any of them."

8. *Performance.*

If all the covenants be in the affirmative¹, the defendant may plead generally, performance of all; but if any be in the negative, to so many he must plead specially, (for a negative cannot be performed,) and to the rest generally (67). So if any of the covenants be in the disjunctive^a, the defendant must shew, which of them he hath performed. So if any are to be done of recordⁿ, he must shew that specially, and cannot involve it in general pleading.

So if a covenant be partly affirmative and partly negative^o; as where the words of the covenant were, that defendant *decederet, procederet, et non derideret*; defendant having pleaded performance generally, the plea was holden bad.

Performance must be pleaded in the terms of the covenant; otherwise it will be bad on general demurrer^p.

9. *Release.*

If a man, by deed, covenant to build an house^q, or make an estate, and before the covenant broken, the covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant itself; because at the time of the release, there was not any duty or cause of action in being.

In covenant by assignee of feoffee^r, against feoffor, for a breach of covenant to make further assurance, in not levying a fine at the request of the assignee; defendant pleaded a release from the feoffee, which release bore date after the commencement of the action by the assignee; on demurrer, it was holden, that the breach being in the time of the assignee, and the action brought by him, and so attached in his person, the covenantee could not release this action, wherein the assignee was interested: Judgment for plaintiff. N. Rolle, in

l 1 Inst. 303. b

m Ib. 4

n Ib.

o Laughwell v. Palmer, 1 Sidf. 87.

p Scudamore v. Stratton, 1 Bos. &

Pul. 455

q 1 Inst. 399. b.

r Middlemore v. Goodall, Cro. Car. 503.

(67) The same rule holds in debt on bond conditioned for the performance of covenants. *Cropwel v. Peachy*, Cro. Eliz. 651. In this case, advantage was taken of the wrong pleading, by demurrer.

his abridgment, states the opinion of the court to have been as reported by Croke, but adds, that judgment was given against plaintiff *pur auter cause*. See 2 Roll. Abr. 411. Release, D. pl. 11.

To covenant for non-payment of rent*, the defendant cannot plead a release, by the plaintiff, of all demands, at a day before the rent in question became due.

Where the party takes a bond, and also a deed of covenant, to secure an annuity, although the bond is forfeited before a discharge under the insolvent debtors' act, (16 G. 3. c. 3.) yet the covenantor may be sued on the covenant, for payments becoming due, after the discharge†. So the insolvent debtors' act, 34 G. 3. c. 69. does not discharge an insolvent, entitled to the benefit of that act‡, from the payment of the arrears of an annuity becoming due, after his discharge, on a covenant made before that act.

10. Set-off.

In covenant upon an indenture for non-payment of rent*, the defendant pleaded *non est factum*, and gave a notice of set-off; Mr. J. Denton, at the assizes, was of opinion, that he could not do so upon this issue; upon a motion for a new trial, the court held the evidence admissible; for the general issue mentioned in the act§ must be understood to mean any general issue. But this case has been since overruled, and the Court of B. R. in Easter T. 56 G. 3. decided that there is not any general issue in this action.

Unliquidated damages*, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off.

To covenant on an indenture of lease of a house for non-payment of rent, the defendant pleaded, that by the indenture he covenanted to repair, and to surrender to the plaintiff, at the end of the term, the premises in good repair*, "casualties by fire and tempest excepted;" that a stack of chimnies belonging to the house had been thrown down by a tempest, which had damaged the house so much that it would soon have become uninhabitable, if the defendant had not immediately repaired it; that he had been obliged to lay out, in the repairs, a sum of money (exceeding the amount of the

* Henn v. Hanson, 1 Lev. 99.

† Cotterel v. Hooks, Doug. 97.

‡ Marks v. Upton, 7 T. R. 305.

§ Gower and another v. Hunt, Bull.

N. P. 181. Barnes, 291 S. C.

‡ 2 G. 2 c. 29.

§ Howlet v. Strickland, Cowp 56.

* Weigall v. Waters, 6 T. R. 486.

rent in arrear) which the plaintiff became liable to repay to him, and that he was ready to set-off the same according to the statute, &c. On special demurrer, it was holden, that the plea could not be supported; for admitting that the defendant could maintain any action against the plaintiff (his landlord), yet the sum to be recovered could only be ascertained by a jury; and, consequently, the damages being uncertain, they could not be set-off to the present action.

VIII. *Payment of Money into Court.*

WHERE covenant is brought for payment of a sum certain^b, as for rent, &c. the money may be brought into court.

In covenant upon a lease, the breach assigned was for non-payment of rent^c, and not repairing the premises; on motion that upon payment of what should appear due for rent, proceedings as to that should be staid, the court said, "this has often been done, so let it be referred to the master."

In covenant^d, the breach was assigned in a sum certain (11*l.*) for not dressing corn. On motion to bring the 11*l.* into court, the counsel for the plaintiff consented, admitting that the breach was assigned with equal certainty, as for non-payment of rent.

In *Fullwell v. Hall*, 2 Bl. R. 837. application was made to the court in an action of covenant to pay money into court, generally, which the court refused; but there being a breach assigned for non-payment of rent, and for not paying 5*l.* per acre for ploughing up meadow land, they permitted money to be paid in on those breaches, on the authority of the preceding case.

^a Covenant on a charter party^e: motion to pay 50*l.* into court; which was opposed; on the ground, that the demand in the breach was 570*l.*; the court held, that the whole must be brought in.

In covenant for non-payment of rent^f, and breach half a year's rent in arrear: motion, that, only a quarter being due, the defendant might be permitted to bring that in; but the court said, that it might be referred to the master to see what

^b Salk. 596.

^c Anon. B. R. Trin. 17 & 18 G. 2.

1 Wils. 75.

^d *Wainmouth v. Houghton*, Barnes, 294.

^e *Spencer v. Fawthorp*, B. R. Tr. 15 & 16 G. 2. MSS.

^f *Bonwick v. Butler*, B. R. H. 17 G. 2. MSS.

was due, and, on bringing that in, to stay proceedings; but there never was a rule to bring in part of the money on a breach. The counsel for defendant, not caring to take that rule, the court denied the motion.

Covenant for non-payment of rent: motion, that it might be referred to the master to see what was due for rent; and that, on payment into court of so much as might be reported due, the plaintiff might proceed on peril of costs, if he should not recover more. Rule absolute, though opposed. See also *Byron v. Johnson*, 8 T. R. 410.

IX. Evidence.

THE plaintiff can recover only *secundum allegata et probata*:

Hence, where plaintiff covenanted for a sum of money to build a house within a certain time^a, and averred in an action for non-payment of the money, that the house was built within the time; it was holden, that evidence that the time had been enlarged by parol agreement, and the house finished within the enlarged time, did not support the declaration.

So where the breach assigned was^b, that the defendant had not used the premises in an husband-like manner, but on the contrary had committed waste. Plea, that defendant had not committed waste. At the trial, the plaintiff offered evidence to shew, that the defendant had not used the premises in an husband-like manner, which did not however amount to waste; the judge rejected the evidence, being of opinion, that on this issue it was not competent to the plaintiff to prove any thing which fell short of waste. This opinion was afterwards confirmed by the court.

In covenant for rent upon a lease by plaintiff to defendant^c, the point in issue was, whether J. S. (whose title was admitted by plaintiff and defendant) demise first to the plaintiff, or to another person; it was holden, that J. S. was a competent witness to prove the point in issue.

^a *Hayes v. Taylor*, B. R. M. 9G. 2. ⁱ *Harris v. Mantle*, 3 T. R. 307.
^b MSS. ^k *Bell v. Harwood*, 3 T. R. 308.
^c *Littler v. Holland*, 3 T. R. 590.

In covenant, under the general issue, *non est factum*, the defendant will not be allowed to give in evidence what amounts to a licence.

X. Judgment.

THE judgment in this action is for the recovery of such damages as the party can prove that he has actually sustained¹.

If the defendant has judgment against him upon nil dicit, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages².

Where the breach was assigned on two covenants³, and plaintiff had good cause of action only on one, and issue was joined on both, and verdict for plaintiff on both, and damages entirely assessed, it was holden that plaintiff could not have judgment.

Covenant was brought against two defendants for not building a house⁴; one suffered judgment to go by default, the other pleaded performance, which was found for him; it was holden, that the plaintiff could not have a writ of inquiry of damages, or judgment against that defendant who had suffered judgment by default; because the covenant being joint and the performance of it having been established by the verdict, it appeared, that plaintiff had not any cause of action.

If on the whole record it appears, that the defendant has committed a breach of the covenant declared on, although the plaintiff states his real *gravamen* informally, judgment cannot be arrested; for, however defective the pleadings are, the court are bound *ex officio* to give such judgment, as the law requires them to do:

As where A. declared that B., before her intermarriage with C.⁵, by deed covenanted with A. to leave certain matters to arbitration, and to abide by the award, provided it were made during their lives; and protesting that B. had not, before her intermarriage performed her part of the covenant,

¹ Ratchiffe v. Pemberton, 1 Esp. N. o Anon. Cro. Eliz. 685.

P. C. 35.

^p Porter v. Harris, 1 Lev. 63.

^m See the form, Townesend, 2 Bk. Judg. 55.

^q Charuley v. Winstanley and wife, 5 East, 266.

ⁿ See the form, 1 Saund 47.

*averred that after making³ of the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay a certain sum ; and the breach assigned was the non-payment of the sum so awarded. After verdict for plaintiff, on non est factum pleaded, it was moved in arrest of judgment, that the marriage of B., after entering into the covenant and before award made, was a revocation of the arbitrator's authority, and consequently there could not be any breach of an award which he had not any authority to make. Lord Ellenborough, C. J. said, that if the case had come on upon a special demurrer, as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring ; but although the plaintiff had stated his *gravamen* informally, yet there was a sufficient allegation of the fact of the marriage being before the award, which constituted a breach of covenant to warrant the court in giving judgment for the plaintiff on that ground. Rule discharged.*

CHAP. XIV.

DEBT.

- I. *Of the Action of Debt, and in what Cases it may be maintained.*
- II. *Debt on Simple Contract.*
- III. *Debt on Bond—Of the Pleadings:*
 1. *General issue, non est factum, and Evidence thereon.*
 2. *Accord and Satisfaction.*
 3. *Duress.*
 4. *Illegal Consideration,*
 1. *By the Common Law; immoral—in restraint of Trade, &c.*
 2. *By Statute; Gaming—Sale of Office—Simony—Usury.*
 5. *Infancy.*
 6. *Payment—Solvit ad Diem—Solvit post Diem, and Evidence thereon.*
 7. *Release.*
 8. *Set-Off.*
- IV. *Debt on Bail-bond—Stat. 23 H. 6. c. 10.—Assignment of Bail-bond under Stat. 4 Ann. c. 16. Declaration by Assignee—Of the Pleadings; comperuit ad Diem—Nul tiel Record.*
- V. *Debt on Bond, with Condition to perform Covenants—Assigning Breaches under Stat. 8 & 9 W. 3. c. 11. s. 8.*
- VI. *Debt on Bond of Ancestor against Heir—Pleadings, Riens per Descent—Replication—Of the Liability of the Heir for the Value of the Land aliened under 3 & 4 W. & M. c. 14. s. 5.—Of*

*the Liability of Devisee under the same Statute.
Judgment—Execution.*

VII. *Debt on Judgment.*

VIII. *Debt for Rent Arrear—Stat. 4 G. 2. c. 28.
against Tenants holding over after Notice from
Landlord—Stat. 11 G. 2. c. 19. against Tenants
holding over after Notice given by themselves—
Declaration—Debt. for Use and Occupation—
Pleadings—Evidence.*

IX. *Debt against Sheriff, &c. for Escape of Prisoner
in Execution—Stat. 13 Ed. 1. c. 11. 1 R. 2.
c. 12.—What shall be deemed an Escape—By
whom the Action for an Escape may be brought
—Against whom—Declaration—Pleadings—
Evidence.*

X. *Of the Statutes, and general Rules, relative to
Actions founded on penal Statutes.*

XI. *Debt on Stat. 2 G. 2. c. 24.—Bribery at Elec-
tions—Provisions of the Statute—Declaration.
Evidence—Stat. 7 & 8 W. 3. c. 4. Treating
Act.*

I. *Of the Action of Debt, and in what Cases it may be maintained.*

AN action of debt lies for the recovery of a sum certain upon simple contract, bond, other specialty, or record; for rent arrear^a; against a gaoler for the escape of a prisoner in execution; or upon statute by the party grieved or common informer. .

If a statute prohibit the doing an act under a certain penalty^b, but does not prescribe any mode for recovering the

penalty, the party entitled may recover the penalty by action of debt.

Debt also lies for the recovery of a sum of money due under an award^e.

So debt lies for an amerciamment in a court leet^d. In this case it ought to be alleged in the declaration, that the defendant was an inhabitant, as well at the time of the amerciamment, as of the offence; but the omission of this averment will be cured by verdict.

The plaintiff declared in debt on a deed^e, whereby the defendant *covenanted* to pay the plaintiff so much per hundred for every hundred stacks of wood in such a place, and bound himself in a penalty for the performance; it was averred, that there were so many stacks, which amounted to a sum exceeding the penalty, for which sum the plaintiff brought his action. On demurrer it was objected, that, as there was a penalty for a certain sum, the plaintiff could not have an action for more than that sum: but the objection was overruled, Holt, C. J. observing, that the plaintiff had an election either to sue for the penalty, or for the rate agreed on, although it exceeded the penalty; for the penalty was inserted only to enforce payment. It was then objected, that the proper form of action was covenant, and not debt: but per Cur. the plaintiff may have covenant or debt at his election; for the rate being certain, when the defendant has the wood, the agreement becomes certain, for which debt lies.

In the action of debt the plaintiff is to recover the sum in numero, and not a compensation in damages, as in those actions which sound in damages only; such as *assumpsit*^f, &c. The damages given in the action of debt, for the detention of the debt are merely nominal.

11. *Debt on simple Contract.*

DEBT lies upon a simple contract, either express or implied^g, to pay a sum certain.

Debt lies by the payee against the maker of a promissory note, expressing a consideration on the face of it; as where

c Adm 2 Saund 66.

d Wicker v. Norris, Bull. N. P. 167.

Ca Temp Hardw. 116 S C.

e Ingledew v. Crips, Ld. Raym. 814.
Salk. 658. S. C.

f Bull. N. P. 167.

g Speake v. Richards, Hob. 306.

it is expressed to be for value received^b. But debt will not lie upon a bill of exchange against the acceptor; for, though the acceptance binds by the custom of merchants, yet it does not create a duty any more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt. The drawer of the bill is the debtor, and continues to be the debtor, notwithstanding the acceptance; for that is a collateral engagement only (1): nor will debt lie for a wager^l.

Debt lies upon a foreign judgment^k: as upon a judgment of the supreme court in Jamaica; and, in an action of this kind it is not necessary for the plaintiff to state the grounds of the judgment, the judgment being of itself *prima facie* evidence of a simple contract debt: it is competent, however, to the defendant, to impeach the judgment by shewing it to have been irregularly or unduly obtained. To support an action on a foreign judgment^l, it is not sufficient to prove the judge's hand-writing subscribed to it; the seal affixed thereto must also be authenticated; or evidence must be given that the court has not any seal; and then the judgment may be established by proving the signature of the judge^m.

A declaration in debt for goods sold and deliveredⁿ, stating that the defendant at W. in the county of M. was indebted to the plaintiff in a certain sum for goods sold and delivered, is sufficient; for the words "sold and delivered" imply a contract; as there cannot be a sale, unless two parties agree; and as the venue goes to the whole declaration, the venue laid must be taken to be the place where the contract was made for the sale of the goods.

Formerly it was considered as necessary, that the amount of the sums claimed to be due in the several counts of the declaration should correspond exactly with the sum demanded in the recital of the writ, and neither exceed^o nor fall short of it^p. But this is not now considered as requi-

h Bishop v. Young, 2 Bos. & Pul. 78.

i 1 d. Raym. 69.

k Walker v. Witter, Doug. 1.

l Henry v. Adey, 3 East, 221. See Buchanan v. Rucker, 1 Camp. 63.

m Alves v. Bunbury, 4 Camp. 28.

n Emery v. Fell, 2 T. R. 28.

o Hulme v. Saunders, 2 Lev. 4.

p Smith v. Vow, Moore, 298.

(1) "Indebitatus assumpsit will not lie in any case except where debt lies: therefore it lies not against the acceptor of a bill of exchange; for the acceptance is merely a collateral engagement: but, indebitatus assumpsit lies against the drawer, who is really the debtor by the receipt of the money; and debt will lie against the drawer." Hard's case, Salk. 23.

site; and in a late case^q, where debt was brought on simple contract, it was holden, on special demurrer to the declaration, that the declaration was good, although the sums claimed to be due in the several counts did *not amount* to the sum demanded in the recital of the writ; and although the breach was assigned for non-payment of the sum demanded; the court observing, that in debt on simple contract the plaintiff might prove and recover a less sum than he demanded in the writ. In like manner where an action of debt was brought in the Court of King's Bench^r, on a bond, and several simple contracts, and the amount of the sums claimed to be due in the several counts *exceeded* the sum demanded in the beginning of the declaration, it was holden, on special demurrer, that the declaration was good; for the words "of a plea that he render £ " in the King's Bench, at least are superfluous words, and being rejected there will not be any repugnance on the face of the declaration. See also the opinion expressed by Lord Mansfield, C. J. in *Walker v. Witter*, 1 Doug. 3d edit. 6. "it is not necessary that the plaintiff should recover in debt the exact sum demanded." See also *Aylett v. Low*, 2 Bl. R. 1221, where in debt on a mutuatus for 200*l.* and verdict for 100*l.*, the court refused a new trial; although it was urged, that debt being an entire thing, it could not be recovered in part.

^q *M'Quillin v. Cox*, 1 H. Bl. 249. ^r *Lord v. Houston*, 11 East, 62.

III. Debt on Bond—Of the Pleadings.

1. *General Issue, non est factum, and Evidence thereon.*
2. *Accord and Satisfaction.*
3. *Duress.*
4. *Illegal Consideration,*
 1. *By the Common Law ; immoral—in Restraint of Trade, &c.*
 2. *By Statute; Gaming—Sale of Office—Simony—Usury.*
5. *Infancy.*
6. *Payment—Solvit ad Diem—Solvit post Diem, and Evidence thereon.*
7. *Release.*
8. *Set-Off.*

Debt on Bond.—If a bond be dated on a day certain, with a penalty conditioned for the payment of a lesser sum^a, and there be not any day fixed for the payment of the lesser sum, such sum is payable on the day of the date; and if an action be brought upon the bond, the court will refer it to the master to compute principal, interest, and costs, and on payment of the same, will stay the proceedings under the stat. 4 Ann. c. 16. s. 13. ^aInterest will become due on such bond^b, although not expressly reserved, and is to be computed from the day on which the money secured by the bond becomes payable, viz. the day of the date.

If a person be bound to pay a certain sum of money at several days^c, the obligee cannot maintain an action of debt until the last day be past (2). But upon a bond with a pe-

^a *Farquhar v. Morris*, 7 T. R. 124. ^b 7 T. R. 124.

See also *Nose v. Bacon*, Cro. Eliz. u. 1 Inst. 47. b. 392. d. F. N. B. 304. 799. 1 Inst. 208. a.

(2) Debt will not lie on a promissory note payable by instalments, until the last day of payment be past. *Rudder v. Price*, 1 H. Bl. 547. See the elaborate judgment of the court, and the distinction there taken between debt and assumpsit in this respect.

nalty conditioned to pay several sums of money at different days^x, debt will lie immediately on default of payment at either of the days (3): for the condition is thereby broken, and consequently the bond becomes absolute. And this rule holds, although the condition of the bond does not expressly provide "that in default of payment at any of the said times, the bond shall be in force."

If A. enter into a bond to pay money on two several contingencies, the obligee may maintain debt on the happening of either contingency^y.

If an instalment of an annuity^z, secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law, for which judgment may be entered, which shall stand as a security for the growing arrears of the annuity.

Where a place of date is mentioned in the bond^a, it is incumbent on the plaintiff to set it forth in the declaration, so that the bond produced in evidence may agree with the bond declared on. Hence, if a bond be dated abroad, the declaration must state the place of such date, and then the venue must be added for a place of trial.

But where a promissory note was dated at Paris, and the declaration merely stated that it was made at London, omitting the place of date, Lord Ellenborough held the omission to be immaterial^b.

In an action of debt^c upon bond, the court will not permit money to be paid into court, but will refer it to the master to compute what is due for principal and interest.

x Coates v. Hewitt, 1 Wils. 80. Bull. N. P. 168. S. C. Hallett v. Hodges, cited by the Reporter, 1 Wils. 80. & Say. R. 29. S. P.

y 1 Lev. 54.

z Judd v. Evans, 6 T. R. 399.

a Robert v. Harnage, Ld. Raym. 1043.

Salk. 659. S. C. 1 Inst. 261 b. See also Dutch W. I. Company v. Van Mosen, 1 Str. 612.

b Houriet v. Morris, 3 Camp. N. P. C. 303.

c Augu. E. 25 G. 3. B. R. MSS.

(3) So on a covenant or promise to pay a sum of money by instalments, an action of covenant or assumpsit will lie immediately on the non-payment of the first instalment. 1 Inst. 292. b. Milles v. Milles, Cro. Car. 241. So if money is awarded to be paid at different days, assumpsit will lie on the award for each sum as it becomes due, and the plaintiff shall recover damages accordingly; and when another sum of the money awarded shall become due, the plaintiff may commence a new action for that also, and so on *toties quoties*. Cooke v. Whorwood, 2 Saund. 337. The same rule holds in respect of duties, which touch the realty. 1 Inst. 292. b.

Of the Pleadings :

1. General Issue, *non est factum*, and Evidence thereon.

THE general issue to an action of debt on bond, is *non est factum*. because the action is grounded upon the specialty. If the defendant plead *nil debet* instead of *non est factum*, the plaintiff may take advantage of it upon general demurrer^d. Upon the issue of *non est factum*, the plaintiff must prove the execution of the bond *by the defendant*. Proof that one, who called himself D., executed, is not sufficient, if the witness did not know it to be the defendant^e. To prove the execution of a bond, the sealing *and* delivery must be proved. Proof of the sealing only is not sufficient. Hence in a case^f where the jury found, that the defendant sealed the bond and cast it upon the table, and the plaintiff took it without any other delivery, or any other thing amounting to a delivery, the court were of opinion, that this was insufficient, observing, that it was not like the case which had then lately been adjudged^g, where the obligor had sealed the bond, and cast it upon the table, saying "this will serve," which was holden a good delivery; because from the expressions used by the obligor, it appeared to be his intention that it should be his deed. If the obligor says to the obligee, "it is sufficient for you," or "take it as my deed," or the like words, it is a sufficient delivery^h. If a person deliver a writing sealed *to the party to whom it is made*, as an escrow, that is, to be his deed upon certain conditions, that is an absolute delivery of the deed, being made to the party himselfⁱ. But a deed may be delivered to a stranger as an escrow^k.

If there is a subscribing witness to the bond who is living, and capable of being examined, such witness alone is competent to prove the execution; because he may know and be able to explain the circumstances of the transaction, of which a stranger may be ignorant (4); and for this reason it

d Anon 2 Wils 10.

e Memot v. Bates, H. 4 G. 2. Bull. N. g. 1 Inst 36 a.

f 171

h 1 Inst 36 a.

f Chamberlain v. Stainton, Cro Eliz. i 1b.

122. 1 Leon 140 Dyer in marg.

192 S. C.

(4) This rule is religiously adhered to, nor can it be dispensed with, even where the instrument is not the foundation of the action, but only given in evidence collaterally. See the opinion of

has been holden¹, that a confession or acknowledgment of the party executing the bond will not dispense with this testimony. Even the admission of the obligor of the execution of a bond in an answer to a bill in chancery², filed for the express purpose of obtaining such admission, has been adjudged to be insufficient without evidence to account for the non-production of the subscribing witness (5). It is not necessary that the subscribing witness should actually see the party execute the bond³, for if the witness be in an adjoining room, and the obligor, after the execution, brings the bond to the witness, and says that he has executed it, and desires the witness to subscribe his name as a witness, this is sufficient. If there be two or more subscribing witnesses, it will only be necessary to call one of them. If the subscribing witness be interested at the time of the execution⁴, and also at the time of the trial, he cannot be examined as a witness to prove the execution, nor will proof of his hand-writing be sufficient. In this case proof of the hand-writing of the contracting party⁵ must be adduced (6). If it can be proved, that the subscribing witness is dead or has become infamous⁶, or is domiciled⁷, or absent in a foreign country, and out of the jurisdiction of the court⁸, at the time of trial; or that intelligence cannot be obtained of him after reasonable inquiry has been made⁹; proof of his hand-writing will in such cases be sufficient (7).

1 Abbott v. Plumb, Doug. 215.
2 Call v. Dunning, 4 East, 53.
3 Park v. Mears, 2 Bos. & Pal. 217.
4 Swire v. Bell, 5 T. R. 371.
5 Godfrey v. Norris, Str. 34.
6 Jones v. Mason, 2 Str. 833.
7 Coghlan v. Williamson, Doug. 93.

8 Prince v. Blackburne, 2 East's R. 250.
9 Cuuliffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 364. Wardell v. Fermor, 2 Camp. N. P. C. 282. S. P. Parker v. Hoskins, 2 Taunt. 223.

Ld. Alvanley, C. J. in *Manners, q. t. v. Postan*, 4 Esp. N. P. C. 240:

(5) But in a case where the defendant's attorney had admitted the signature of the defendant, and of the subscribing witness to the bond, Lord Ellenborough ruled, that this must be taken as a presumptive admission of all the subscribing witness professed to attest, and would have been called to prove, and consequently, that it was not necessary to bring proof of delivery. *Milward v. Temple*, 1 Camp. N. P. C. 375.

(6) In *Godfrey v. Norris*, Str. 34. where the plaintiff was administrator *de bonis non* of the obligee, and the only surviving witness to the bond, Parker, C. J. permitted evidence of the hand-writing of the obligor to be given.

(7) So where a bond is attested by two witnesses and one is dead,

By stat. 26 G. 3. c. 57. s. 38. deeds executed in the East Indies, and attested by witnesses *there*, are made evidence on proof of the hand-writing of the parties, and of the witnesses, and also that the witnesses are resident in the East Indies.

and the other beyond the reach of the process of the court, proof of the hand-writing of the witness that is dead is sufficient *.

It appears from *Wallis v. Delancey*, 7 T. R. 266. n. that Lord Kenyon thought it necessary in cases of this kind, that the hand-writing of the obligor should be proved, as well as the hand-writing of the subscribing witness. But although this point was doubtful formerly, it appears to have been solemnly decided in the following case.

Debt on bond †: there was one witness to the bond who was dead, his hand-writing was proved, but not the hand-writing of the obligor.

On Serjt. Kerby's objecting, that hand-writing of obligor was not proved, Lord Loughborough directed a non-suit.

Walker, Serjt. moved to set aside the non suit; because signature is not necessary, and if subscribing witness had been dead, he need not have proved hand-writing of obligor. Cited 2 Rep. 5. Salk. 462. and Ford's MSS. note of case before Eyre, C. J. where a deed was attested by two witnesses who were dead—the hand-writing of one of the witnesses only was proved, and not the hand-writing of the other witness or *of the party-executing deed*.—Kerby, Serjt. The obligor need not have signed, but having signed the bond, his hand writing ought to have been proved; the ancient reason (3 Lev. 1.) for sealing is now at an end, the most satisfactory proof is the hand-writing, instead of sealing—the witness's attestation is not the only evidence, and after his death there being no opportunity of cross-examining him as to the execution, best evidence is that of obligor's hand-writing—relied on the practice. Lord Loughborough thought the proof of obligor's hand-writing much the most satisfactory to court and jury. Gould, J. thought so too, and according to his memory it was the practice on Western circuit. Nares, J. differed on principle and practice of Oxford circuit. Heath, J. concurred with Nares, J. on principle and practice—said that it was good *prima facie* evidence. Lord Loughborough, C. J. thought the practice ought to decide, and would take time to inquire of it—afterwards the court granted a new trial. N. In conversation a few days after, Gould, J. expressed his dissatisfaction to Serjt. Kerby.

In addition to the preceding decision it may be observed, that Mr. J. Buller, in *Adam v. Kerr*, 1 Bos. and Pul. 361. held, "that the hand-writing of the obligor need not be proved; that of the

* *Adam v. Kerr*, 1 Bos. and Pul. 360.

† *Gough v. Cecil*, C. B. Trin. 24 G. 3. Serjt. Hill's MS. 21. p. 78.

"If the bond be 30 years old or upwards", it may be given in evidence without any proof of the execution (8); some account, however, ought to be given of it, where found, &c.^u in order to raise the presumption, that it was regularly executed (9). But if there be any blemish in the bond by rasure or interlineation, the execution ought to be proved, although the bond be above 30 years old, by the subscribing witness, if living, and if he is dead, by proving his hand-writing, in order to encounter the presumption arising from the rasure, &c.

The defendant, on the general issue of *non est factum*, may give in evidence any thing which proves the deed to be void at the time of pleading; as rasure, interlineation, addition to, or other alteration of the deed in a material point by

^u Bull. N. P. 955.

^y Pigot's case, 11 Rep. 27 a. 5 Rep. 119. b.

^x Governor and Company of Chelsea Water Works v. Cowper, 1 Esp. N. P. C. 275.

subscribing witness, when proved, is evidence of every thing on the face of the paper; which imports to be sealed by the party.^y The same doctrine may be inferred from the cases of *Cunliffe v. Sefton*, 2 East, 183. and *Prince v. Blackburn*, 2 East, 250.

If the subscribing witness swears that he did not see the deed executed, then the execution may be proved by evidence of the hand-writing of the party*. The same rule holds with respect to a promissory note†.

(8) This rule extends to other paper writings, as well as deeds, e. g. old receipts. *Fry v. Wood*, M. 11 G. 2. B. R. MSS.

(9) It is worthy of remark, that in *Rees v. Mansell*, Hereford Sum. Ass. 1765, MSS. Perrot, Baron, held, that if a deed is read in evidence on account of its antiquity, yet if on the other side it is shewn, that one of the witnesses is alive, he must be produced; or the deed must be rejected. And he said a deed being produced in B. R. and going to be read, it appeared that Sir J. Jekyll was a subscribing witness; upon which the court said, they knew he was alive, and if he did not come to prove it, plaintiff must be non-suit. It was mentioned to have been said, by Yates, J. on a former circuit, that, for the sake of practice, the witness should not be admitted to prove an old deed, even if he attended for that purpose; but Perrot, B. retained his opinion, and said, that an old deed is admitted only on a presumption, that the witnesses are dead; but when the contrary is made to appear, they must be called.

* *Fitzgerald v. Elsee*, 2 Camp. N. P. C. 635. *Laverack, J.*

† *Lemon v. Dean*, 2 Camp. N. P. C. 636. n. *Le Blanc, J.*

the obligee, or even by a stranger without the privity of the obligee. In like manner the defendant, on *non est factum*, may give in evidence coverture^a or lunacy^a, at the time of execution; or that the bond was given to a feme covert, and her husband disagreed to it; or that the bond was delivered as an escrow^b; or that he was made to execute it when he was so drunk, that he did not know what he did^c. But if the deed is voidable only, as by reason of infancy or duress, in these, and the like cases, the obligee cannot plead *non est factum*; for it is his deed at the time of action brought, and must be avoided by special pleading^d. So if the bond is voidable by statute, that must be pleaded specially. In the case of a joint bond, if one obligor only be sued, he must plead the matter in abatement^e; for he cannot take advantage of it in evidence on the general issue *non est factum*^f, although it appear upon the declaration that there are other obligors^g; nor can he demur upon oyer^h. So where the bond is executed by three obligors, and two only are suedⁱ. But where it appears on the record, the objection may be taken in arrest of judgment^k.

2. Accord and Satisfaction.

It appears from some of the books^l, that to debt on bond an accord executed *before the day of payment* may be pleaded. I am not, however, aware of any case, in which this point has been expressly determined. If such plea can be pleaded, the following rules ought to be attended to; first, that the thing given in satisfaction be of some value in contemplation of law^m; hence, a release of an equity of redemption is not sufficient: secondly, if the debt arises by the performance or breach of the conditionⁿ, and not by virtue of the bond, the accord and satisfaction must be pleaded in discharge of the condition, and not of the bond; lastly, if the debt

z 12 Mod. 609 per Holt, C. J. Lambert v. Atkins, 2 Camp N. P. C. 272 S. P.

a Yates v. Boen, Str. 1104 per Lee, C. J. on the authority of Smith v. Carr, by Pengelly, C. B. See Faulder v. Silk, 3 Camp N. P. C. 196.

b Stoyles v. Pearson, 4 Esp. N. P. C. 255. Ellenborough, C. J.

c Cole v. Robbins, per Holt, C. J. Salk. MSS. Bull. N. P. 172. Pitt v. Smith, 3 Camp. N. P. C. 33.

d 5 Rep. 119. a.

e Watta v. Goodman, Lord Raym. 1460.

f Whelpdale's case, 5 Rep. 119. a. Stead v. Moon, Cro Jac 152.

g South v. Tanner, 2 Taunt 254.

h Gilbert v. Bath, Str 501

i South v. Tanner, 2 Taunt 254. Gaulton v. Challiner and Wilkinson,

1 Wms. Saund. 291 e. n.

k Horner v. Moor, B. R. M. 24 Geo. 2. cited by Aston, J 5 Barr. 2614.

l Anon. Cro. Eliz. 46. cited in Comp. Dig. Accord. (A. 1.)

m Preston v. Christmas, 2 Wils. 86.

n Neale v. Sheffield, Yelv 192.

arises upon an obligation without a condition, satisfaction by deed only can be pleaded; for the bond itself cannot be discharged without specialty.

Accord and payment of part before the day⁹, with a promise to pay the residue at a future day, which promise the obligee accepted in full satisfaction of the debt, is not a good plea; because the promise to pay is executory.

Although one bond cannot be pleaded in satisfaction of another⁹, yet payment of a less sum *before* the day in full satisfaction, and acceptance thereof in full satisfaction, may be pleaded in bar to debt on bond; because parcel of the debt, before the day, ~~may~~ be more beneficial to the obligee than the whole at the day, and the value of the satisfaction is not material. But care must be taken in this case to plead the payment of part to have been made in *full satisfaction*⁹; for if the plea states the payment of part *generally*, it will be bad.

3. Duress.

To debt on bond the defendant may plead, that it was obtained by duress of imprisonment (10). This plea admits the deed, and the proof of the issue lies on the defendant. If the defendant can prove that he was compelled to execute the bond, when he was under an arrest, without legal process⁹, or by the process, or warrant of a person not having legal authority⁹, it is sufficient. So if the arrest was by warrant from a justice of the peace, on a charge of felony, where there had not been any felony committed⁹; or if the defendant, having been arrested under legal process, was forced by tortious usage in prison⁹, it will be construed a duress.

The duress must be of the *person* (11) of the *defendant* or

v S. C. Cro. Jac. 254. Preston v. r Id. Resolved.
 Christmas, 2 Wils. 86. s Com. Dig. Plead. (2 W. 19)
 p Balston v. Baxter, Cro. Eliz. 304. t Id.
 q Cro. Eliz. 716. Hob. 6s, 9. Cro. u Aleyn, 92.
 Car. 85. Admitted in Pinner's case, x 2 Inst. 489.
 5 Rep. 117. a.

(10) See the form of this plea in the Clerk's Assistant, 77.

(11) In 1 R. Abr. 687. p. 3. it is said, that if a person executes a deed by duress of his goods, he may avoid the deed; and 20 Ass. pl. 14. is cited, where a release made by an abbot, by duress, of his cattle, was holden void. But in Sumner and Feryman, Hil. 1708. cited in 2 Str. 917. it is said to have been holden, that a bond could not be avoided by duress of goods. See also Bro. Abr. Duress, pl. 16. S. P.